

No. 13129

United States
Court of Appeals
for the Ninth Circuit.

M. C. SCHAEFER,

Appellant,

vs.

SAM MACRI, DON MACRI, JOE MACRI, W. R.
McKELVY and CONTINENTAL CASUALTY
COMPANY, a Corporation,

Appellees.

Transcript of Record
In Two Volumes
Volume II
(Pages 267 to 654)

Appeal from the United States District Court,
Western District of Washington,
Northern Division.

FILED

FEB 12 1952

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A. J. GOERIG

recalled as a witness in his own behalf, resumed the stand and testified further as follows:

Direct Examination

By Mr. Hawkins:

Q. Mr. Goerig, you are a partner of Clyde Philp? A. Yes.

Q. Doing business as Goerig and Philp?

A. Yes.

Q. Handing you Goerig and Philp's identification 2, will you state to the Court what that is?

Mr. Holman: It speaks for itself.

Mr. Hawkins: He's entitled to identify what is in his hands, for the purpose of the record. How is the appellate court going to know?

Mr. Holman: I submit the witness' conclusion is not the best evidence, your Honor.

The Court: I'll overrule the objection.

A. Well, it is a suit against Goerig and Philp, Clyde Philp and A. J. Goerig, individuals, and also Van Valkenburg and Mendel Rose; suit by the First National Bank to recover, suing us for——

The Court: Well, I think that goes into too much detail.

A. It is a suit of the bank for somewhere around \$37,000.00.

Q. This is a copy of a summons and complaint that was served upon you? A. Yes.

Mr. Holman: That I have no objection to. I move the rest of it be stricken.

The Court: Yes, it may be stricken. It is a copy

(Testimony of A. J. Goerig.)

of a summons and complaint served on him.

Mr. Hawkins: I will offer this in evidence, your Honor.

Mr. Holman: I object to it, your Honor, not on the question that this is not a substantially and probably true copy; it purports to be a summons in King County case 381592, and a complaint, and a writ of garnishment, but the defendants are shown to be Philp and Goerig individually and as copartners transacting business under the name of Goerig and Philp, and as co-partners transacting business under the name of Goerig Construction Company, Mendel Rose, and H. C. Van Valkenburg, and in the writ of garnishment and complaint they are shown to be doing business as the Rovon Trading Company.

The Court: It seems to me this copy of summons and complaint at best could be only somebody's assertion that there had been an assignment of one of the documents in evidence here, and the interests of defendants Macri under that instrument. I'll sustain the objection. It wouldn't be evidence that there was an actual assignment, it seems to me, and the fact that they've been sued I don't believe would be a defense here, the action in state court itself, unless there had been an assignment. That is just the view I am expressing of it.

Mr. Hawkins: I don't contend it is *res judicata* or anything of that kind. Mr. Macri has testified that he has made an assignment to the bank of the claims he has out of this termination agreement

(Testimony of A. J. Goerig.)

which is in evidence, and this evidences the fact that the Seattle First National Bank has started action upon that assignment which Mr. Macri testified he made, and I think we're entitled to show that. Counsel has inferred this was given merely for collateral purposes, and that they were really the owners of it, and therefore entitled to bring this action, but the fact is the assignment was made and the Seattle First National Bank is attempting to foreclose on that collateral, and we're attempting to show that, to show that the Macris have no cross-complaint in this action, and it is offered for that purpose; if the objection is on the ground that is not a certified copy——

Mr. Holman: I said I didn't raise that at all, but Mr. Goerig's testimony already shows that he's known of this assignment since last July, or some time ago, so the defendants Philp and Goerig have not been diligent in submitting proof here of something of which they claim they had knowledge a long while ago, and this is not the best evidence; it is not competent evidence.

The Court: I will admit it for the limited purpose of showing that suit has been instituted against at least Mr. Goerig, and that he's been served with a copy of summons and complaint based on the assignment. Exception will be allowed.

Mr. Skeel: On behalf of the bonding company I also wish to submit an additional objection to this document, in that it in no way affects the bonding company or third-party creditors, that is, the plain-

(Testimony of A. J. Goerig.)

tiffs in this case. Furthermore, since there is no copy of the assignment on there, and since the summons and complaint shows on its face that it has to do with a job outside and additional to the jobs which this suit are based on; in other words, this is based on 1062 and 1068; I believe the complaint shows it is based on some other job having nothing to do whatsoever with this case.

Mr. Holman: I would like to join in the surety's objection also, principally on behalf of the creditor plaintiffs; they're not here.

Mr. Hawkins: In a sense counsel is correct, that it is based on a loss on another joint venture. However, it is one of the joint ventures mentioned in the termination agreement, and the complaint recites that the assignment has been made on all of these adventures, and therefore it is a simple matter for the bank, if they so choose to do, to amend that complaint and include this as well as the others. Of course, the reason they haven't done it at this point is that the loss hasn't been ascertained, but it will be done, there is no question about that.

The Court: I'll overrule the objections, and admit it for what it is worth.

Mr. Holman: Exception.

Direct Examination
(Continued)

By Mr. Hawkins:

Q. Mr. Goerig, do you know Mr. Macri?

A. Yes.

Q. Did he handle these jobs that we're concerned with here, 1062 and 1068? A. He did.

(Testimony of A. J. Goerig.)

Q. Did you have anything to do with these jobs?

A. No.

Q. Did Mr. Philp have anything to do with those jobs? A. No.

Q. Did you order any of the materials that are sued on in these actions? A. No.

Q. Did you order any of the labor in connection with those jobs? A. No.

Q. Did you have any supervision of those jobs?

A. No.

Q. Did Mr. Philp have any supervision of those jobs? A. No.

Q. They were solely under the direction and control of Mr. Macri?

Mr. Holman: Just a minute; I think on this last question I'll object on the ground it is leading.

The Court: It started out to be. Proceed.

Q. Did anyone other than Mr. Macri have anything to do with those jobs?

A. The Macri Company.

Q. That is—— A. Don, Sam——

Q. The Macri brothers?

A. The Macris, the Macri Company.

Q. Did you ever receive any of the letters that have been introduced in evidence here today?

A. I haven't seen them.

Q. With more particular reference to Plaintiff's C, D, E, F, G, H, I, J, and K?

A. No, I never saw any of them.

Q. Your answer was no? A. No.

Q. That they were never called to your attention. Where did you and Mr. Philp main-

(Testimony of A. J. Goerig.)

tain your office at the time these jobs were in progress? A. In the Lloyd Building, Seattle.

Q. And did the Macris have their own separate office? A. Yes.

Q. Where was that located?

A. Down off of Jackson Street in Seattle, I think that they had it.

Mr. Hawkins: You may cross-examine.

Cross-Examination

By Mr. Holman:

Q. Mr. Goerig, it has been a fact, has it not, to the best of your information, that from the time you entered the joint venture agreements pertaining to these jobs, shown by Plaintiff's Exhibits A and B on to the completion of these jobs the work was conducted by Macri and Company, correct?

A. It was conducted by Macri and Company.

Q. Yes, sir. What, if anything, at any time, in any way, did either Mr. Philp, to your knowledge, or you do toward notifying any of the materialmen, laborers, or otherwise on those jobs that you had terminated the Exhibits A and B?

Mr. Hawkins: Just a moment. Your Honor, there is not one iota of evidence in the record here that the materialmen or the plaintiffs in this case ever knew about the joint venture agreement in the first place, so it becomes entirely immaterial whether a notice was given of the termination.

(Testimony of A. J. Goerig.)

Mr. Holman: I want to know if he did notify anybody.

Mr. Hawkins: Well, it is immaterial. There is no testimony that they knew of it in the first place.

The Court: Well, I'll overrule it, and determine the effect of it.

The Witness: No.

Q. You knew, did you not, that there was material being furnished, there were labor items being accumulated, work was being performed there, did you not?

A. Well, on such a job there is always material and labor, yes.

Q. Now, is it or is it not a fact that the time the joint venture agreements, Macri's Exhibits 1 and 2, were entered into, that there was to be a bond obligation for the performance of those jobs, to be signed by Macri and Company?

Mr. Hawkins: I object to this question, your Honor. It is not material or germane to the direct examination at all.

The Court: I'm not sure that I got the question. Read it.

Mr. Holman: May I re-state the question, your Honor?

The Court: All right.

Q. What I would like to know, Mr. Goerig, is whether or not you knew that each of these jobs covered by Plaintiff's Exhibits A and B required and would have to have surety bonds?

(Testimony of A. J. Goerig.)

A. I think in this case the bonds were already up by Macri and Company.

Q. You knew that?

A. I'm not positive now on that question.

Q. At least, it was a current matter that you were informed about, was it not, Mr. Goerig?

A. It was what?

Q. A current matter at the time you signed Defendant's Exhibits 1 and 2, it was a current matter that the bonding of these jobs would be covered?

Mr. Hawkins: Your Honor, I again renew my objection, I don't think your Honor ruled on it the first time, namely that this is not germane to the direct examination. I did not go into this question of the bond at all. I ask that all that testimony be stricken. I made an objection and there was no ruling of the Court on it.

The Court: I think I'll sustain the objection. The bond wasn't gone into on direct; it isn't cross-examination. Of course, I don't know that it is of very much practical concern, because he has been the witness of both sides here, and being an adverse witness, you could examine him by leading questions anyway. If you wish to open up your direct examination, I'll permit you to do so for that purpose.

Mr. Holman: I'm satisfied with the direct examination. No further questions.

(Whereupon, there being no further questions, the witness was excused.)

(The following stipulation was entered on February 25, 1947, during the trial of cause No. 246, and while the witness, R. M. Moorhead, was testifying on behalf of the defendants Macri.)

Mr. Hawkins: Will the record also show the objection as to Goerig and Philp? I would like to ask that counsel stipulate any objection made by a defendant will apply to all defendants.

Mr. Olson: That is agreeable.

The Court: All right, the record may show that.

Reporter's Certificate

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and acting official court reporter of the District Court of the United States for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the District Court of the United States for the Eastern District of Washington, held at Yakima, Washington, on February 21, and February 25, 1947.

That the above and foregoing, consisting of 14 numbered pages (exclusive of this page) contains a full, true and accurate transcript of a stipulation and the testimony of A. J. Goerig occurring on February 21, 1947, and a stipulation occurring on

February 25, 1947, including all objections and the court's ruling thereon.

Dated this 2nd day of August, 1947.

/s/ STANLEY D. TAYLOR,
Official Court Reporter.

[Endorsed]: Filed April 16, 1951.

[Title of District Court and Cause.]

SETTING OF MOTION TO DISMISS

Before: The Honorable John C. Bowen,
District Judge.

April 9, 1951, 10:00 a.m.

The Court: The next case on the calendar is the Schaefer case. Will counsel and Mr. Schaefer come to the counsel table? The Court will discuss the matter of a future hearing on this. I will not be able to hear it myself.

Mrs. Curry: Your Honor, may I make a statement?

The Court: You may.

Mrs. Curry: The purpose of our motion and notice was just that, was a motion to set the motion to dismiss. Inadvertently the notice brought on the original motion, and I would like to correct our notice to read "Motion to set the motion to dismiss."

The Court: Let the record show that the notice is so amended.

Mrs. Curry: All that we want, and I believe other counsel also, is to get the motion set.

The Court: I do not believe Judge Hall will have an opportunity to hear the question, because Judge Hall has to take over the Tacoma calendar, and it leaves more Court work than I can do here.

It is possible that there might be a time when Judge Driver while he is here might hear these motions. Judge Driver will be here next week. Is there any reason why this matter should not be on his calendar next week, subject to other matters which he himself may have already set on Monday?

Mrs. Curry: May I ask the Court, does that mean that the motion to dismiss will be set down for hearing?

The Court: Everything that is pending in the way of a legal question will be before Judge Driver.

Mrs. Curry: I would like the motion before the Court today disposed of by setting down the motion to dismiss, your Honor. This motion of ours and of other counsel to this amended complaint has been on file since February 16, and we have been diligent in trying to get a hearing for it. I realize what the calendar is so far as the Court is concerned, but I would like to have our motion to dismiss and the alternative motion to strike set down for hearing on a day certain.

The Court: Is there any objection, Mr. Schaefer, to setting this before Judge Driver next Monday, a week from today?

Mr. Schaefer: No, there is not, your Honor.

The Court: Every motion now pending and every legal question which may properly then be pending are set down in this case, and all matters in this case are transferred to Judge Driver's Court which he will be holding here beginning next Monday, at 10:00 o'clock in the forenoon.

I happen to know that Judge Driver intends to hear a habeas corpus matter, or some questions pending in connection with a habeas corpus proceeding, which he originally commenced to hear in the Eastern District, but which subsequent questions have been set down for hearing before him while he is attending in Seattle in order to better accommodate all of the parties and their counsel interested in the proceedings. Doubtless those will be heard first. I do not know how long they will take. I think he had the impression that it would not take long to hear those, but he may have a different impression today. The one I refer to was a few days ago, when he was talking over the telephone about it.

This case and all of the questions and the entire case is transferred before Judge Driver for his consideration and attention, and I ask counsel to appear before Judge Driver next Monday, at 10:00 o'clock in the forenoon in this building at some courtroom which will then be assigned to Judge Driver.

Mr. Egan: May I address the Court, your Honor, regarding a clerical error on my motion? I represent defendants Macri, and when I handed the

pleadings to the young lady so she could get the heading, I notice she headed it "Motion of Continental Casualty Company." The body of it is correct, but I am speaking of the title.

Actually, it is the motion of Sam, Don and Joe Macri, and so that Mr. Schaefer will not be laboring under any misapprehension, nor the Court either, I would like at this time to have the clerical error corrected. It appears on my motion, your Honor, that is all.

The Court: Will counsel stay together and go to the Clerk's office and by interlineation make whatever amendments or corrections they wish to? Mr. Schaefer, will you go with them and be present when that is done so that you will know what is done.

[Endorsed]: Filed April 23, 1951.

[Title of District Court and Cause.]

RECORD OF PROCEEDINGS AT HEARING
ON MOTIONS TO DISMISS AND ALTER-
NATIVE MOTIONS TO STRIKE

Be It Remembered that the above-entitled cause came on before the Honorable Sam M. Driver, United States District Judge, on Monday, April 16, 1951, at Seattle, Washington, the plaintiff appearing in his own proper person, without counsel, the defendants Macri appearing by Granville Egan, attorney at law of Seattle, Washington; the defendant, W. R. McKelvy, appearing by A. P. Curry, of

Skeel, McKelvy, Henke, Evenson & Uhlmann, attorneys at law of Seattle, Washington; the defendant Continental Casualty Company, a corporation, appearing [1*] by Carl E. Croson and Willard Hatch, attorneys at law of Seattle, Washington; the defendants Goerig and Philp not appearing, either personally or by counsel, whereupon the following proceedings were had and done, to wit:

The Court: Has the Continental Casualty Company been dismissed out of this suit?

Mrs. Curry: No one has been dismissed. The order of dismissal was entered, but the plaintiff was permitted the right to amend the complaint. The order of dismissal was entered for all of us.

The Court: Was that for all of them?

Mrs. Curry: Yes.

Mr. Egan: The defendants Macri, when we presented our demurrer the other two had been dismissed, and Mr. Schaefer asked if our demurrer would not be argued, because he was going to file an amended complaint anyhow, and he asked if we would just pass our argument, which we did.

The Court: Oh, I see, the motion was granted, but the plaintiff was given leave to amend, and now the question is on motion for dismissal of the amended complaint, and motion to strike, too, I think.

Mrs. Curry: In the alternative, yes. I represent Mr. McKelvy, Mr. Croson represents the Continental Casualty, and Mr. Egan the Macris. I don't believe Goerig and Philp have appeared. [2]

The Court: There's no one representing them,

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

then, and Mr. Schaefer is appearing for himself?

Mr. Schaefer: That's right, your Honor.

The Court: All right.

Mrs. Curry: Mr. Schaefer filed a complaint that was some eight pages long and attempted to allege a conspiracy against all of the defendants. At that time we made a motion to dismiss, and the matter was assigned to Judge Lemmon, and Mr. Schaefer was given thirty days to file an amended complaint, and he filed one ninety-two pages long, which has taken me an awful long time to read, let alone anything else. I don't think that there's a single thing in the complaint that wasn't alleged in the original complaint. He has alleged a lot of material, hearsay, not even evidence.

The Court: A considerable portion of it is setting out documents in prior court proceedings.

Mrs. Curry: Everything, but one thing is certain, his whole case is before the court right now so we can have a final determination at this time. First I would address myself to the allegations of the complaint. As I say, actually there's nothing in this complaint that wasn't alleged in the other complaint.

The Court: It's been my view that where this so-called "notice pleading," the short skimpy complaint that may be resorted to under the rules of civil procedure, where that's [3] employed you should be very liberal and not grant a motion to dismiss if it's possible to spell out a cause of action within the general framework of the complaint. You think this is not a notice pleading?

Mrs. Curry: This is not a notice pleading; this is a story-book, but be that as it may, our motion to dismiss was on the grounds it did not state a claim; whatever claim he had against McKelvy is barred by the statute of limitations, and that it was redundant, but I'm not addressing myself principally to redundancy, because I want an order of dismissal.

The Court: I think consideration should be given to the fact that the plaintiff is not an attorney, and he is appearing, as he has a right to do, in his own behalf, and while of course we can't lay aside all the rules in a case of this sort, we should take it into consideration.

Mrs. Curry: But on the other hand, there is some limit to this consideration, and it's a terrible burden on the rest of us. Three parties have had three sets of attorneys up here, and of course in our case we get no fee for it, but be that as it may it has been a very burdensome undertaking, and I don't think there is anything that can avail the plaintiff for all of this effort, but now taking the complaint as to the allegations, the first eleven pages of this complaint tells the story that between December 7, 1943, and December 31, 1944, he got two contracts—— [4]

The Court: What were those dates?

Mrs. Curry: December 7, 1943, and December 31, 1944, a little over a year. Your Honor, I will recall this case to you. The case that this is based upon was tried before your Honor in Yakima.

The Court: I remember it very well.

Mrs. Curry: In that year Macris got a contract for the Roza project, and the plaintiff signed two subcontracts with the Macris for excavation and concrete work, and during that period he got into a row with them about what they were to do and what he was to do, and there were two meetings had on the field, and he made notes of those meetings, and he alleges that he later gave Mr. McKelvy those notes, and what was said by Mr. Macri and what he said and what his contention is. That is all that is alleged in those eleven pages, and then the only allegation of conspiracy in that is on page 5, line 27, where he alleges that the defendants Macri, and defendants Philp and Goerig, and Continental Casualty Company through its agent and attorney in fact, the defendant, Philp, were attempting from the beginning of said subcontract to bankrupt Plaintiff, ruin his reputation and credit by not paying Plaintiff as per contract requirements, by not performing their part of the work. That's the only thing that is pertinent to this lawsuit in those eleven pages. On page 11, I believe, he alleges on November 1, 1944—— [5]

The Court: I saw that conspiracy allegation; where is that?

Mrs. Curry: Page 5, line 27. It's no conspiracy; they were going to do these things, but that's the nearest thing he has in all those eleven pages. Now, on page 11, line 25, he alleges that he employed McKelvy; "That said conspiracy was joined by defendant, McKelvy, on 11/1/44 and furthered by him as more fully appears from the following facts:"

That's the first time we really have an allegation of conspiracy. Now, after that he alleges that his own bonding company, which was Glens Falls, and which, by the way, was a client of ours suggested that he go up to our office and particularly to see McKelvy, and then he employed McKelvy to file a quantum meruit suit, he alleges that on page 12, and then again the only other statement that has any pertinency to this lawsuit is line 28, "Plaintiff informed Defendant, McKelvy, that the Macris were bonded by Continental Casualty Company with both performance and payment bonds" and before that he alleges he employed McKelvy and told him about his subcontracts, and then he says all that he told McKelvy, and he reiterates everything he said before in the complaint, the first eleven pages.

He says that he told McKelvy all of those things that he alleged in the first part, and he sets out in detail letters of the Reclamation Service, not to McKelvy, and pertaining to his contract or to the contract, and then he alleges on page [6] 15 that McKelvy told him "he did not think it would be necessary to bring suit since Macris' attorney, Mr. Holman, had been in their office for a number of years and that although Mr. Holman was now associated with another office, they were still cooperating as if he were still with their office; that they were just like that," whatever that meant; and then he sets out beginning on page 16 the advice he got from Mr. Skeel and McKelvy. That is in the preliminary matter before they had gone over

the matter very thoroughly, more or less the general contract.

Then he sets out on pages 16 to 20 those memos that he had referred to, your Honor, of the field meetings between himself and Macri, and four pages of that, it's all set out, the notes he took down and he said he gave to McKelvy, and he sets that out, then on page 20 he said McKelvy said he would study the matter, and then he sets out a photostatic copy of a memorandum, it's in the usual form that our office communications are, to Mr. Kelley, and Mr. Kelley was an employee of the firm just like I am at the present time, and McKelvy's thought was simply to look this thing up, that this man seemed to have some troubles, and see what his rights were, and what could be done, and the little pencil memo on that is in Kelley's handwriting, so it's evidently his memo; and then on page 22 he said that the Macris sued him, charged him with default, wrote him a letter and charged him with default, and [7] actually that's what he came into our office about, was this thing Macri was accusing him of, and then there was a meeting in Holman's office, and Holman confirmed some opinion he had about the payments on the job, and that meeting was in January, 1945, and he sets out a letter which he says nobody sent and nobody got, but apparently was addressed to the Macris, but was evidently a proposed letter that McKelvy proposed to send, but he says that the recipients said they didn't get it, and that he is advised it never was sent.

Then on page 25 he refers to a newspaper clipping about some one of the Macri boys being charged with a forgery, about which I know nothing, and then he says on October 15, 1945, that McKelvy told him to hide his assets, which Mr. McKelvy denies absolutely; anyway, we were representing Glens Falls; if we had done that we would have been defeating our own purpose or defeating the interest of our client, Glens Falls Indemnity Company.

Then he says he had what he calls a run-around there, getting appointments from Mr. McKelvy, and that Mr. McKelvy made an appointment and didn't keep it, which occurred apparently October 15 to 20; anyway, on October 20, 1945, McKelvey told him he could not represent him in a suit against Macris, because Macris were bonded by Continental Casualty Company, and they were old, old clients of the office.

The Court: What was that last date? [8]

Mrs. Curry: October 20, 1945; and then he alleges that he hired Olson, who was one of the attorneys we had recommended to him, and he brought the suit, or somebody brought the suit in Oregon which was dismissed, I guess Macris brought that suit which was dismissed, and that original complaint is all set out on pages 28 to 33 of this complaint, and then he alleges that on December 20, 1945, after we were out of this case, and on page 33 of the complaint, he alleges he brought the suit in Yakima, and on page 34 is the first statement again of any conspiracy. Oh, there's one more thing; on

page 28 he says that on December 12, 1945, that was after we were out of it, because that was October 20, 1945, on that date the defendants, Macris, Continental Casualty Company (through its agents Philp & McKelvy and defendants Philp & McKelvy personally)—now, if he means McKelvy there, there isn't anything to tie that name in, and I believe he means Philp and Goerig.

The Court: What page was that?

Mrs. Curry: Page 28, because there's no allegation of agency, and there was an allegation of agency to the bond, Philp and Goerig had a joint venture agreement with the Macris and they signed as attorneys in fact the Continental bond, but McKelvy wasn't involved in that, and so when he says "through its agent Philp and McKelvy" I'm inclined to think he means Philp and Goerig, because that is the name of the co-venturers. [9] They were a partnership, but anyway that's there.

Then the next allegation of conspiracy is on page 34, and he alleges at line 23 "After filing of Plaintiff's suit in Yakima, Washington, as aforesaid, the aforesaid conspiracy was furthered by defendants, Macri, Philp and Goerig and Continental Casualty Company, by delaying, appealing separately, delaying payment till 11-9-1949, in the following particulars:" and then he sets forth all the details of that litigation and the appeal. From page 26 to page 67 is all the Yakima proceedings.

The Court: Where does that start?

Mrs. Curry: 26 to 67. Even your opinion is set forth there, and I'm rather interested that you said

it was a hard case, and on page 51, quoting you, "Now, coming to the law applicable to this situation, it is of course difficult, and I am frank to say I think that the case cited by Mr. Ivy, *United States vs. John A. Johnson and Sons*, 65 F. Supp. page 527, if it were followed, would preclude recovery by Mr. Schaefer, at least against the bonding company" so it would indicate that the Continental and the Macris and everybody else had some grounds for their defense, and it would not support that allegation that there was a conspiracy to delay by appealing and so forth, but anyway, from 26 to 67, in there someplace he makes an allegation that our office represented Continental in that lawsuit, and that has me quite [10] disturbed, because all the proceedings—you see, he sets forth all the complaints and the answers and the opinions, and everything shows that other counsel represented Continental Casualty Company, but what happened was that there was, if you recall, five use suits under the Miller Act, suits brought against the Macris and Continental Casualty Company. The only question in those lawsuits, as I recall, is whether or not the bond covered the amount, and the testimony of Philp and Goerig was used in all five cases and by a stipulation used in this lawsuit, but we didn't represent Philp and Goerig. In those five use cases Willard Skeel was representing Continental Casualty Company. Mr. Schaefer was not a party to those cases, but for convenience these parties in this lawsuit stipulated to use that testimony of Philp and Goerig, and that only pertained to their joint

adventure with the Macris and had nothing to do with Schaefer and our office, or anything else pertaining to the lawsuit.

The Court: I don't suppose I can take judicial notice as visiting judge here what happened in another lawsuit in the Eastern District of Washington.

Mrs. Curry: Your Honor, you don't have to; it's all alleged in the complaint.

The Court: I do distinctly remember that Mr. Ivy, the Yakima attorney, was the one who did all the talking for the Continental anyway in that case, and there were a number of [11] days of trial and argument and so on, but I remember there was that situation, there were other suits in which the Continental Casualty Company was involved.

Mrs. Curry: I was concerned on that; that statement is I think on page 36, yes, on line 13, February 21, 1947, which, your Honor, is true of the use suits; that's the time Willard Skeel appeared, 250, 251, 255, 257, 267, but the allegation is, "Willard E. Skeel of Skeel, McKelvy and so forth, represented Continental Casualty Company in said lawsuit in Yakima, Washington, copy of the hearing this date is recorded in the transcript" and that part of the transcript is that portion of the use cases that was used in Schaefer's case, but we had nothing to do with it on anything else.

Then, your Honor, to correct your statement, I believe you can take judicial notice of it; I have a case, *Inland Fruit Company vs. Red Cross Line*, 5 F. 2d 218, which held the Federal court takes

judicial notice of any reported decision, and in doing so may examine the records, and in this case it was appealed from your court to the Ninth Circuit Court, so it's a reported decision, and in doing so you can take judicial notice of all the records in it.

Now then, down to 67. 67 to 85 is all of the appeal, including the copy of the reported decision. On 85, line 26, we have another statement of conspiracy; except for one thing on page 46, the only way you could tie McKelvy in would [12] be on line 5 and 6——

The Court: What is this action for, damages?

Mrs. Curry: He's asking a million dollars from Mr. McKelvy and the rest of them.

The Court: I know, but it's for damages for conspiracy to injure him in his business?

Mrs. Curry: I don't know; I'm just telling you what's in the complaint, that's all I can do.

The Court: I wondered, though, if you're arguing the statute of limitations, if it's your position that the statute would have run against the acts of these defendants unless there was a continuing conspiracy?

Mrs. Curry: It would run against McKelvy, at any rate.

The Court: What would be the applicable statute?

Mrs. Curry: Two years, and that is cited, your Honor, in that case Mitchell vs. Greenough, 100 F. 2d 184, I think it was Judge Schwollenbach's decision, Remington's Revised Statutes 165, a two

year statute, otherwise it would be three years for tort or fraud or contract.

The Court: I think Mr. Mitchell alleged a conspiracy, didn't he?

Mrs. Curry: Yes.

The Court: I may have been in that suit; I was in one of them for a million dollars. I considered it quite a compliment. [13]

Mrs. Curry: Maybe Mr. McKelvy will feel this is a compliment after he gets over being annoyed by it. There's a statement there about the defendants, and I suppose that would include McKelvy. He says March 21, 1947, this is the date on which the court rendered an opinion in the trial on plaintiff's complaint and defendants' answer, which ultimately resulted in judgment in the trial court in favor of the plaintiff—you gave him some \$57,000, if I recall—and against the defendants, of plaintiff's suit for quantum meruit. Now, Mr. McKelvy was not a party in that suit, and our office was not an attorney of record, so that word defendant can't possibly refer to us, but it is there.

Now, on page 85, as I say, all of this from 67, when he took his appeal, to 86 is all about the appeal to the Circuit Court. The record he sets out there shows that our office had no connection with it, but on 85, line 26, he said that they presented him a draft, and it had three words in the draft that he didn't like, and he had to argue for a couple of hours to get those words deleted from this draft. Continental, of course, paid the judgment, but we weren't there, and he sets those out, and then he

says on line 26: "The above three underlined words were used in furtherance of defendants' concerted plan, and would have deprived plaintiff of his right to maintain this suit." Those three words, being on the back of the draft, read: "The sum of \$66,306.48 in full payment [14] and satisfaction of Judgment, interest, costs and so forth." Now, he insisted on the deletion of those words "interest, costs and so forth" and he alleges their insertion was a concerted plan to deprive him——

The Court: What was it appeared on the draft?

Mrs. Curry: It read: "Received of Continental Casualty Company the sum of \$66,306.48 in full payment and satisfaction of judgment, interest, costs, etc., in cause entitled United States for the use of M. C. Schaefer" and so forth and so on, and he had objected to the use of the words "interest, costs, etc.," and makes the allegation on line 26 that the above three underlined words were used in furtherance of defendants' concerted plan, and would have deprived plaintiff of his right to maintain this suit. I'm just picking out the possible allegations of conspiracy. Then on page 87 he alleges that McKelvy stopped in to see him August 16, 1950, and asked him to pay a bill, and McKelvy admitted the bill was outlawed, and he told McKelvy so and so, and McKelvy said so and so, and that goes on for practically the rest of the complaint, except he said McKelvy said: "We're honest, we've been in business since the turn of the century," and he says that wasn't true, because it just appeared in the newspaper Mr. Skeel had

founded the firm in 1917, and I think the court can take judicial notice that our firm preceded the entrance of Mr. Skeel in it, it was then Roberts and Wilson. [15]

The Court: Before that it was Skeel and Whitney; I worked there for six months in 1916. Scarcely any member of the bar in the State of Washington hasn't at one time or another. I worked in Skeel and Whitney's office from June to December, 1916, the year I graduated from law school.

Mrs. Curry: Well, I worked there twenty-five years ago, and went back. Then there is nothing more alleged in that complaint, and he asks for a million dollars. In the original complaint he asked for two million. Now, Judge Lemmon, we had a transcript made of the proceedings that were had on the original complaint, and, your Honor, there's 61 pages of transcript for that alone.

The Court: There seems to be a transcript of a hearing before Judge Bowen here, too.

The Clerk: Yes, there was a brief hearing before Judge Bowen.

Mrs. Curry: Yes, but Judge Bowen said he was sick. I guess we started our preliminary statement, Judge Bowen said he didn't feel well, and he transferred it to Judge Lemmon.

The Court: Is the transcript before Judge Lemmon in here?

The Clerk: I don't think it's been filed, your Honor.

Mrs. Curry: But I have it, and I'd like to read

from it what Judge Lemmon said. He was most patient with this man, and he advised him, gave him the best course on conspiracy [16] that any freshman in law school could possibly have, and he hasn't done anything Judge Lemmon told him to do except to write a longer complaint. Judge Lemmon did not advise that. Beginning on page 45 he said this: "You see, in your complaint, now, you don't definitely and unequivocally allege an agreement which precedes any of these acts done. There is no allegation in here what the agreement was. Toward the end you say that certain damages were sustained as a result of the concerted action. But a concerted action may result in damage and still not be actionable. It would have to be concerted action pursuant to an unlawful conspiracy against you."

Then on page 46: "Then you should allege that. You see, you haven't alleged what he agreed to do." Then he says: "I try to surmise what could be the damage you sustained from this. You allege, however, after you state Mr. McKelvy refused to go ahead and represent you in the litigation, that you obtained some other lawyer. You allege, therein, that you were successful and that you obtained judgment for what was granted or asked for in that action. I assume from that you obtained the damages that—Mr. Schaefer: No, your Honor, I obtained the cost of the job, itself. The Court: In other words, you were recompensed fully for any fault or breach by these Macri brothers of your contract? Mr. Schaefer: No, your Honor. I

was only recompensed for the cost of doing the physical work on the job.” [17]

Then the Court goes on: “Well, taking this complaint—and that is all I can take in ruling upon these motions—you allege that you brought suit against Macris and were successful and that you collected the judgment therein. Of course, there is no allegation there of any loss by you of anything that Macri might have done or not have done—any breach by him of the attorney-client relationship with you. If there was any damage sustained by you in addition to that, there should be appropriate allegations. As far as the allegations are concerned, it appears to me that no damage was concerned merely from the delay in bringing that suit; and that you had full recovery from any loss you sustained in your relations with the Macri people.

“The fault of your argument, in which you advance evidentiary matters to me, is a fault I find in your complaint. There is so much evidence you put in this. You shouldn’t allege evidence. You should allege what we call the ultimate fact; namely, these parties agreed in some form, alleging how they did it, and that they did these things to injure and harass yourself, and then that they did certain things in furtherance to carry out the unlawful agreement and combination. You haven’t alleged those clearly. You allege a lot of evidentiary fact that may come into the trial of the case. In some instances you don’t even allege they were done in furtherance of any conspiracy. The main

fault is that you [18] haven't alleged unequivocally a conspiracy or agreement between the parties.

"Well, Mr. Schaefer, I am going to have to stop you. I know you are not a lawyer, but you are going into matters that are outside of anything that I can consider. I have tried to tell you that evidentiary matters are not before me. There is just the question of pleading before me. If you have got something to tell me or present to me in reply to the arguments made by counsel for the defendants, I will listen to you, but I can't listen to this evidentiary matter that you are telling me. Your principal grievance seems to be against Mr. McKelvy. If it were alone as against him, as far as your complaint is concerned, the breach of his contract with you occurred in 1945—I think you said in October or November. * * * Now, just a minute. If that is the sole basis of your cause of action against McKelvy, the statute would have clearly run against that. If you are keeping him in through a conspiracy, as I say, you must allege plainly and unequivocally what that agreement was and that it antedated any of these acts that you speak of. Then you must allege that these acts were in furtherance of that conspiracy. You must allege, as I say, what the conspiracy was—what did these people agree to do? Those allegations must be sufficient to show what they agreed to do as to an unlawful act or to accomplish a lawful act through unlawful means. You haven't [19] done that. As far as the statute of limitations is concerned in connection with the conspiracy, I again state to you

that the statute, as I understand the law, runs from the last overt act done in furtherance of the conspiracy and in carrying out the agreement between the parties. You can allege in an amended pleading an overt act done within the period of limitation and that, of course, would overcome the vulnerability which is present in your pleading. I will be obliged to grant these motions and I do it with the provision that you may have a reasonable time within which to file an amended pleading. How much would you want? Would you want as much as 30 days?"

Then he set the bond. I went through and made a little memorandum of authorities I had cited in the previous proceeding, and the first of those is that in a conspiracy the statute 165 Remington's Revised Statutes applies, according to Mitchell vs. Greenough, and if not, it would be 159, which is the three-year statute applying to fraud and contract, but there is no action; I cited particularly three cases that came up in this jurisdiction because I thought this was going to appear originally before Judge Bowen, and I don't think that there is any case that states the law more simply and completely than Judge Neterer's decision in the Ransom case. Edith Ransom was an actress, and she had appeared in a movie and attained some notoriety, and gotten herself some job in [20] Honolulu as a hostess and I guess caused some trouble there, and she alleges she was shanghaied out of Honolulu and up to Yokohama and across the Pacific and taken and put in an insane ward, and that this was a con-

spiracy of the two steamship lines and individuals and everybody concerned, 1 F. Supp. 244. Judge Neterer was very patient with her and explained to her if she had any cause of action it would be of libel against one of the defendants and assault against the others, but that the combination of all those did not make a conspiracy. The other Ransom case was 2 F. Supp. 409.

They are based upon a case that was tried with good counsel on both sides, Puget Sound Power and Light vs. Asia, 2 F. 2d 491, which alleged a conspiracy, I guess against their franchise here, but it was a conspiracy by these parties by bringing lawsuits, and in the Asia case they said that a person imagining or fancying a remedy had a right to the court, and I said at that time and I say it now, the defendant fancying a defense has a right to defend an lawsuit, and in this case the Continental would have a right to defend it, and certainly McKelvy wasn't to blame because they did defend the lawsuit in Yakima, but in the Ransom case Judge Neterer said that each of these actions of committing a tort would not cause a conspiracy; that conspiracy looks to the future, not to the past; it's a stranger to what has happened; there has to be a concerted action for the future, and it's [21] doing an unlawful thing, or doing a lawful thing unlawfully, and then that brings me to the next part of this——

The Court: By the way, did you give me the citation of this Judge Neterer case?

Mrs. Curry: Yes, Ransom vs. Matson Naviga-

tion, 1 F. Supp. 244; Ransom vs. Dollar Steamship Company, 2 F. Supp. 409, and then Puget Sound Power and Light Company vs. Asia, 2 F. 2d 491. I've cited another case there because it speaks of a concert of action in commission of an unlawful act, or that a complaint must allege a concert of action in commission of the unlawful act, or facts from which there is a natural inference of an unlawful overt act through a common design, and that was so well expressed that I used the case, Calcutt vs. Gerig, 271 F. 220.

Now, there is no damage alleged in this case. You have to tie your damages in and show from the facts of the case that they were the natural consequence of an overt act. There's no overt act so far as the defendant McKelvy is concerned alleged, but if there was, there is no damage, because just saying you're damaged—he doesn't say how he was damaged or that any of these acts caused any damage to him; then I have set forth the authority that you can make a motion to dismiss because of violation of rule 8a, of not stating facts concisely. One of those cases was a per se case, and the court said that much is a hodgepodge of material and [22] immaterial, relevant and irrelevant, which is not admissible even as evidence, and I think that certainly hits the nail on the head here, but I haven't found anything alleged that's relevant with the possible exception he said he employed McKelvy on November 1, 1944, and on October 20, 1945, McKelvy told him he couldn't

sue the Macris because they were bonded by the Continental Casualty Company.

If there is any further authority needed I have several memorandum of authorities in the file, your Honor.

The Court: The Court will take a five-minute recess.

(Short recess.)

Mrs. Curry: Your Honor, as long as I quoted from this transcript I'd like to offer it.

The Court: All right.

Mr. Croson: May it please your Honor, I am Carl Croson, as I said this morning, appearing for the Continental Casualty Company, and I would like to introduce to your Honor my associate who is here with me, Mr. Willard Hatch of our office.

If your Honor please, your Honor will find in the record our motion to dismiss or in the alternative a motion to strike. We assign our statement of reasons in support of our motion. These are set forth clearly in the record, and I'll briefly call them to your attention. The citations upon which we rely follow after each suggestion, so I think that your [23] Honor will have no difficulty in following them, therefore I am not going to quote except from very few cases.

The Court: I think I saw that in here. I didn't have time to look up the citations.

Mr. Croson: If your Honor please, then, I'm going to try to direct myself very bluntly to what I consider the questions in issue. Naturally we

can't do this in a moment, with 92 pages to cover, and I'll be as short as I possibly can. Let us have this clearly in mind—I know it's redundant, almost, and unnecessary to say it to your Honor, but your Honor hears a great many cases and a great many sets of facts, but just to get this clearly in mind, as I tried to last night, I'd like to review the fundamentals. A motion to dismiss should be sustained where averments of the complaint show that the plaintiff cannot state a cause of action upon which he may recover.

I'd like to keep that in mind, because if your Honor please, we were before the court for some time on the original complaint, and I think when your Honor reads the exhibit that has just been filed before your Honor, you will see there never was a plaintiff more courteously treated or given more specific instructions as to what to do in order to be in court with a complaint that would state a cause of action.

The second thing to keep in mind is that conspiracy itself, as Mrs. Curry has said, does not give rise to a cause of [24] action. A conspiracy is only that thing which binds the parties together and brings them together, making one responsible for the overt act of another. It takes the overt act as well as the conspiracy or the agreement. Now, in order to have this conspiracy there must be a preconceived plan. Notice that the courts all say a preconceived plan. As Mrs. Curry has well said, it does not relate back; it is a preconceived plan; the very start of a conspiracy is an agreement en-

tered into by the parties. I have cited a number of cases in connection with that point, which appear in our memorandum.

The next thing is that the minds of the conspirators must meet understanding, so as to bring about an intelligent and deliberate agreement to do the acts and to commit the offenses charged. It's not just enough to get together and talk loosely about the matter. There must be a determined and an agreed and an understanding, deliberate agreement to do the acts and to commit the offense.

The mere knowledge—this is one of the points for us to keep in mind—that the mere knowledge, acquaintance or even the approval of an act without cooperation or agreement to cooperate is insufficient to hold any party in a conspiracy combination. That is not sufficient, if one knows what the other may be doing. It is essential to create a civil liability for conspiracy that there has been an overt act by one or more of the conspirators pursuant to the scheme and in [25] furtherance of the object. There must some place be that scheme and that objective.

The complaint alleging tortious acts which were committed at a time clearly within the bar of the statute of limitations was subject to dismissal notwithstanding an averment that the conspiracy was continuing, because it is the act done under that agreement that is the thing that sets the whole matter in motion. There is nothing set in motion, regardless of an agreement, regardless of an understanding, regardless of a meeting of the minds,

there is nothing sets that in motion until there is the overt act done in pursuance of that specific scheme and agreement.

The Court: Is it your position, then, suppose that a conspiracy were alleged here and it was alleged that certain overt acts were done which would give rise to the cause of action up to say 1946, then the mere fact that the conspiracy continued, but no further overt acts were done, that would be the basis of a cause of action, is it your position that the statute would run in that case?

Mr. Croson: Yes, your Honor, from the overt act. It takes something to set it in motion. I think that's clearly the law in the matter, and I also concur in this, that the two-year statute is the applicable statute. It is not specifically mentioned in the three-year statute or in the two-year statute, but then we have a catch-all that says anything not [26] mentioned in the rest of them belongs in the two-year statute; but even in the three-year statute we'll show your Honor that this falls, even within the three-year statute.

We have cited the same case Mrs. Curry has quoted, 100 F. 2d 184, that's section 165 of Remington's Revised Statutes, and even if section 159 is the applicable statute, it would be, if this is a fraud case, if your Honor should determine this is an action resting against Mr. McKelvy for failing to do something he had assumed to do, an obligation he had assumed to do, the three-year statute would still be applicable. The case Mrs. Curry cited

with respect to damages, Moffett vs. Commerce Trust Company, the court says there that a conspiracy action is in tort.

The objection that the complaint is verbose and redundant in violation of rule 8 and 12 of the Federal Rules of Civil Practice is properly taken by a motion to either dismiss or to strike, so we put in the alternative motion to dismiss or strike. All of these matters, if your Honor please, are supported by the statement of authorities which we have given your Honor.

I don't know of any better way to help your Honor, and I wish to be helpful, than to just call your Honor's attention to where the Continental Casualty comes into this picture and into this complaint. The Continental Casualty, of course, is the ordinary bonding company. Here was a contract entered [27] into between Macri and the government through the Bureau of Reclamation, then along comes the letting of this subcontract. The subcontract is let to the plaintiff here. The plaintiff then has his cause of action against Macris, against the principal contractor. The Continental Casualty Company being the bond, and being a bonding company in the ordinary sense and the ordinary conditions in this case as well as thousands of others, finds itself drawn into a suit between Macri and Schaefer because of the fact that it has given that bond. Now, being drawn into that suit it is its right, of course, to defend, and to defend in all legitimate ways.

The first place that there is mention, and I have

marked these in two ways, if your Honor please, and I think you'll find that everything I am telling your Honor is checked in our memo which follows, I'll explain it a little more fully than it is there, but I call it again to your Honor's attention, just the page where you will find the references to Continental. I have done that simply to assist your Honor as you might review it.

On page 1 in paragraph 3 there is this statement: "That during all the times herein complained of, beginning on 3/2/44 and ending on 8/18/50, plaintiff suffered substantial damages, hereinafter more fully alleged, as the sole and proximate result of the overt acts (hereinafter alleged in detail) of defendants who did wrongfully and maliciously conspire, [28] combine and confederate together with wilful and malicious intent to injure, defraud and damage plaintiff." He says defendants, so I have marked that because we are named as defendants. However, that allegation is not sufficient to comply with any of the authorities given or any good rule of pleading. It may be a preliminary paragraph, but there must be alleged and set out clearly the agreement made between the parties. You can't just say there was a conspiracy; that's nothing but a conclusion, so what we are looking for is the same thing we looked for in the original complaint, what is the agreement, where is the meeting of the minds as to these parties defendant as to what they were going to do and how they were going to do it, and what was the act that set

that in motion? Those were the things we're looking for in this complaint.

Then again on page 1, that Clyde Philp signed as attorney in fact for the Continental Casualty Company. On page 2 we have the performance bond, and the Continental Casualty of course is mentioned. We have the signature of the Continental Casualty. Page 4, we have the statement on number 3, plaintiff did not know of these facts until after suit was filed in Yakima, Washington, on or about 1-17-46. All of the matters up to this time, then, have been or were known to the plaintiff on or about 1-17-46, that's taking the extreme time. Whether the fact that there was or wasn't a bond, or who [29] signed the bond, those matters are all matters that a subcontractor generally looks into at the time he enters into a contract with a prime contractor, but let us assume that he didn't know; he had ways and means of knowing, and he should have known the bond that he had, that was up with the prime contractor to protect him.

Now, I find nothing then until we get over to page 6 of the amended complaint, and here he says at the very bottom of the page, if your Honor please, and that's listed under 12, 7-15-1944, it starts out: "This is the date on which it is alleged that an agreement terminating the joint venture between the Macris and the silent partners, Clyde Philp and A. J. Goerig, was signed. This termination agreement, of course, was effective as to the plaintiff but not effective as to the Continental Casualty Company." I mention that only because

that's another place the Continental Casualty Company is mentioned, but keep in mind now that that's the date in 1944 that the joint venture between the principal defendant, Macri, and the partners, Philp and Goerig, that that agreement was terminated, that joint venture agreement. In other words, Philp and Goerig operated for a time as contractors and came into this picture and then were out again on the 15th day of July, 1944.

Now, we pass on with a great deal of allegation as to the pleadings and so forth, but we come to the Continental [30] Casualty Company again on page 12, and that again, if your Honor please, is marked number 16 here, and 11-1-1944: "On or about this date plaintiff employed Mr. McKelvy to file a law suit in quantum meruit against the Macris and the Continental Casualty Company on job specification # 1062 Roze Project, Yakima, Washington, and to terminate the second subcontract on job specification # 1068 because of Macris breaches of said contract," and so forth. Again I call attention to that because it mentions the Continental Casualty Company, and that is the time that Mr. McKelvy was employed to start this suit, and he says in quantum meruit. I don't know where that phrase comes in in anything else, but it's here now, and it shows your Honor and shows me and everybody else, it's pleaded, that at that time he had had sufficient advice from counsel and help that he, a layman, knew a quantum meruit suit as against a damage suit. He says now in this complaint, I believe it was not so alleged in the former complaint,

but now he alleges that he employed McKelvy to bring this particular kind of a suit, which I say is very, very artful education as far as layman is concerned.

At the bottom of the page then, line 29, "Plaintiff informed defendant McKelvy that the Macris were bonded by Continental Casualty Company with both performance and payment bonds." Again Continental Casualty Company is mentioned. I am doing this with a definite purpose; as your Honor very [31] likely foresees, I want to show your Honor that there is not a single allegation that Continental Casualty Company ever entered into a scheme with anybody to defraud this man or in any way to harm or injure him or commit an overt act with that purpose in mind. My purpose is to show your Honor that there is nothing alleged here that would make the Continental Casualty a party to this suit as a conspirator scheming, planning and working out a program to be carried into effect by an overt act.

Then on page 14, line 22, we find this, which is a copy of a letter from the Bureau of Reclamation office at Yakima addressed to Continental, or rather addressed to the Macri Company, with copies to Continental Casualty Company and Concrete Construction Company. I think we are not concerned with that, it's surplusage, but again the Continental Casualty Company is mentioned as having got a copy of that letter from the Bureau of Reclamation.

Then on page 16 there is at the top of the page,

at line 3, that Mr. Skeel stated that he couldn't see how we could hold the Casualty Company. That was at the time that Mr. Schaefer was in Mr. Skeel's office, Mr. McKelvy being the man to whom he went primarily, Mr. Skeel, senior partner, being called in. So says the complaint. Again nothing that Continental Casualty has done.

We move on then in the complaint until we come to page [32] 22. Now, that refers now to a matter—number 18, it's the paragraph 18 on the left hand side. Now, I'm using the last three lines: "On this date there had not yet been any preparatory work done by the Macris and it was not possible for plaintiff's crew to do any work on this job. All the defendants herein knew these facts." I'm just bringing that in because it says "all the defendants." January 3, 1945, from the allegations, Macri had done no work on this job. That's not Continental Casualty's fault, nor is it alleged any place that Continental Casualty Company in any way told them to not go ahead and do the job, or to delay the work; it would have been clearly against the interests of Continental Casualty Company to have participated in that sort of a situation.

Now, 1-23-1945 there is an allegation of a meeting. This is interesting because of this fact; there is set forth now: "Mr. McKelvy and plaintiff met with Sam Macri and his attorney, Mr. Tom Holman, at Mr. Holman's office in Seattle." In other words, here was Macri and his attorney meeting with Mr. McKelvy and the plaintiff as they went over this matter. Then this ends, after discussing the differ-

ences between those two, McKelvy—I don't mean McKelvy—the Macris and the plaintiff. Then it says: “All the defendants herein knew these facts.” Now, those are mentioned, I have that marked in the blue, because it says “defendants” and they're only involved in general language and not specific. [33]

Now page 25, paragraph number 24, line 18, about the 15th of October, 1945: “As Mr. McKelvy and plaintiff were walking up the street in Seattle, Mr. McKelvy told plaintiff that plaintiff could not collect from Macris as the Macris had all their assets hidden, that the chances of holding Continental Casualty Company were very slim.” Now, that's the statement of the attorney to his client. The name is mentioned, therefore I call it to your Honor's attention, but nothing is said as to what Continental Casualty Company did or any scheme or plan laid out in which Continental Casualty Company was participating.

Then we move on to page 27, line 3: “Plaintiff at this meeting”—now, this was a meeting where there had been an alleged appointment with Mr. McKelvy, and when the plaintiff says that Mr. McKelvy failed to keep an appointment. Again nothing that the Continental had to do with it, but getting to line 3: “Plaintiff at this meeting insisted that defendant McKelvy state definitely the date that suit would be filed against the Continental Casualty Company and the Macris”; the name is mentioned, therefore it comes in, “and also asked defendant McKelvy how long plaintiff yet had in

which to bring suit. Defendant McKelvy then for the first time informed plaintiff that he could not represent plaintiff in any action against the defendants Macris and the Continental Casualty Company because Macri Company was a good customer of Continental [34] Casualty Company, who was one of defendant McKelvy's largest accounts, and that they handled nearly all of Continental Casualty Company's legal work in Washington." I read that whole paragraph because of the mention of the name Continental Casualty Company, but that simply discloses what any honorable attorney would do, that there was now a conflict of interest, and that they could not go ahead with the litigation.

Now, at the end of that particular section as they are numbered here, line 20: "That all the aforesaid acts by defendant McKelvy were in furtherance of the original conspiracy of defendants Macri and Philp and Goerig, and Continental Casualty Company through said defendant Philp and through its attorneys, Messrs. Skeel and McKelvy." Nothing at all there to bind Continental Casualty Company. Not a thing that Continental was doing. What was that original conspiracy? The pleader, if he were an attorney, I would say to your Honor that he had pleaded himself out at that point, because he says the original conspiracy when he has never alleged an original conspiracy, he has never alleged a scheme, he has never alleged a plan, he has never alleged any meeting of the minds, any concerted, planned program that they were going to work out;

the minds must work in concert with an understanding as to what will be done.

Then just so there will be no mistake about the work [35] involved, line 27—I'll read a little farther back—"On or about this date plaintiff employed Harry L. Olson of Yakima, Washington, as attorney to do the same things which defendant McKelvy previously had agreed to do, namely, file a law suit against the Macris and the Continental Casualty Company on job specifications # 1062 and # 1068 and to do all things necessary to protect plaintiff in all his rights." McKelvy is out, Olson is in, and Olson takes over on the date 10-22-1945, so the complaint alleges. Now a new attorney is on the job, a new attorney who is asked to do the same things which he asked McKelvy to do.

Now, taking the last paragraph on that page, "Plaintiff fully informed Olson of all things herebefore in this complaint set forth including all the details of the wrongs done to plaintiff by defendant McKelvy. Mr. Olson told plaintiff: 'Let's take one thing at a time.' " Now, apparently at that time, and I think we can read in this complaint very clearly, plaintiff says he fully informed Olson of all things herebefore in this complaint set forth, including all the details of the wrongs done to plaintiff by defendant McKelvy. He must have told Olson of all the things he complained about McKelvy. If there were any conspiracy he must have told what that conspiracy was. If there was any scheme he must have revealed what that scheme was. If there was any overt act to set it in motion

he must have told him what that was. He said he told [36] him all the details, and Olson told him to take one thing at a time.

Now, the next full paragraph on page 28: "On this date the defendants Macris, Continental Casualty Company (through its agents Philp & McKelvy and defendants Philp & McKelvy, personally), in furtherance of their malicious concerted conspiracy, filed a malicious suit in the Circuit Court of the State of Oregon for the County of Multnomah." Then he sets out the case there. It's Sam, Joe and Don Macri, copartners, plaintiffs, against Mr. Schaefer. Now, the sum and substance of that action is an action in the state of Oregon on an alleged claim of Macris against the subcontractor for not having fulfilled his contract. Reading the entire pleadings throughout your Honor will see that this is the culmination of the plaintiff's differences with Macri, in which Macri was—in which Schaefer was complaining Macri wasn't doing his work, therefore he was delaying Schaefer in doing his, and then Macri coming back and telling Schaefer that he wasn't accomplishing his. It was a case of "You're not doing yours" and then the reverse, "You're not doing yours" but the interesting thing of that is here is a case of Macris against Schaefer, and it's an Oregon case, and notice the attorneys as they appear on page 33, the attorneys are the same attorneys that Macri had all the way through this matter, Tom W. Holman, whom your Honor likely remembers, Maguire, Shields & Morrison, [37] a Portland firm, are listed there as the attorneys.

Now, I wanted to make one remark about the fact that everything was told on the 22nd day of October, 1945, everything was told to Olson that I'm putting my finger on that as a time when everything was known to the plaintiff, and whenever it was revealed by the plaintiff to a competent attorney, as being the date upon which if there were anything, the statute would start to run.

Now, on page 34 we have a letter set out which comes from the government telling the plaintiff how to proceed and what to follow on with. Line 13 it says "The Macri Company was bonded by the Continental Casualty Company." Nothing done by Continental Casualty Company, and 17th of January, 1946, "After filing of plaintiff's suit in Yakima, Washington, as aforesaid, the aforesaid conspiracy was furthered by defendants Macri, Philp and Goerig and Continental Casualty Company, by delaying, appealing separately, delaying payment till 11-9-1949, in the following particulars:" and then reading on, "When Continental Casualty Company then saw that plaintiff's suit was not filed in damages as they had anticipated plaintiff would file (If plaintiff had filed in damages Continental Casualty Company could not have been held liable) but instead suit was filed in Quantum Meruit, and then Continental Casualty Company became concerned and anxious to have some solvent defendants added to the case. They then, for the first time, [38] brought to plaintiff's attention the fact that there should also be named as additional parties defendant in plaintiff's said suit a partnership com-

posed of Clyde Philp and A. J. Goerig. Continental Casualty Company also secretly gave the following information to plaintiff's attorney, said information contained in a letter dated January 17, 1946, received from Harry L. Olson, plaintiff's attorney in the Yakima suit."

In other words, the Continental Casualty Company revealed, apparently, that Clyde Philp and A. J. Goerig were a copartnership and had had some connection with the matter, but even at that date this arrangement had been cancelled, but the Continental Casualty Company was making full disclosure. Of course, there's a different motive ascribed to the revealing of the matter.

Bottom of the page: "See copy of agreement terminating joint venture hereinabove under date of 7-15-1944. Plaintiff also discovered for the first time during the course of the trial of said suit in Yakima, Washington, that defendant Clyde Philp not only was a silent partner in the joint venture with defendants Macris and Goerig, but also had signed as attorney in fact for Continental Casualty Company the bonds posted by defendants Macris." That first time I spoke of the bonds was when I made the comment that it was an open matter, open to him as well as anyone else.

The next time the Continental is mentioned is page 37, [39] and I want to call your attention again to a confusion. May I ask your Honor to turn back to page 36; you'll find there "In the District Court of the United States" and so forth, "No. 246." Now, keep that in mind a moment, and we turn then

over to page 37, and we find this was before your Honor, and the plaintiff not appearing, the defendants Sam, Don and Joe Macri appearing by Tom W. Holman, of Brethorst, Holman, Fowler, and Dewar, of Seattle, Washington; the defendants A. J. Goerig and Clyde Philp appearing by Kenneth C. Hawkins, of Brown and Hawkins, of Yakima, Washington; the defendant Continental Casualty Company, a corporation, appearing by Willard E. Skeel, of Skeel, McKelvy, Henke, Evenson & Uhlmann, of Seattle, Washington.” This was a hearing in 246, and in a matter, as I understand it, where there was a small amount of testimony, but in which the testimony of Mr. Goerig and Mr. Philp was taken and then by stipulation it was agreed that it might apply to all actions, and this is action 250 we’re talking about, it was 250 before your Honor, so that Willard Skeel appeared in an entirely different situation, because in your Honor’s case as we will see just a little bit later here, Mr. Ivy appeared all the way through, and Mr. Hutcheson. Mr. Hutcheson later carried the matter to the Supreme Court. We move on then, this is a lot of controversy that occurred between the attorneys, and then there is the certificate by the official court reporter, and we carried on through then [40] to page 51. We had a report now all the way through there without the Continental Casualty being mentioned at all; all the way through it is this litigation and the dispute between Macri and Schaefer.

Then we come to this last paragraph, these are your Honor’s remarks: “Now, coming to the law

applicable to this situation, it is of course difficult, and I am frank to say I think that the case cited by Mr. Ivy, *United States vs. John A. Johnson and Sons*, 65 F. Supp. page 527, if it were followed, would preclude recovery by Mr. Schaefer, at least against the bonding company. However, it is my view that in these cases, although there is involved the construction of the Federal statute, the Miller Act, that nevertheless, so far as the substantive rights are concerned, that the law of the state is entitled to first consideration." Now, page 53, without reading all of your Honor's remarks, the bonding company is mentioned, and I call that again to your Honor's attention: "I think under the decisions of the state court that Mr. Olson cited here and were cited in his brief, that the sub-contractor is entitled to recover on that basis against the bonding company also." Now, that was on the basis, "Mr. Schaefer, electing to perform in the face of the breach by the main contractor, was entitled to the fair and reasonable value of the work."

Your Honor will recall the case very clearly, of course, [41] but there was that line of divergence which is a question as to whether it is the fair and reasonable value of the work, where there is a failure of performance, or whether it is a matter of damage, and your Honor took the view, stating very frankly the difference of opinion and citing the case that had been cited to your Honor—I'm not quarreling with the decision, your Honor knows, I'm simply pointing out this, that when this case was

before your Honor it was then a case where there was some question.

Now, the bonding company is mentioned there. Your Honor says on page 56, line 3 "It seems to me that this is an unliquidated claim. It necessarily must be so. If Mr. Schaefer is entitled to recover only for the fair value of his services, it required and would require testimony as to the amount and value of those services, so that they could not be liquidated until that evidence is received and passed upon by the court." In other words, this is a matter that the court had to determine.

Now, again, page 58, your Honor still giving your Honor's opinion, I won't say opinion, either, it is a statement in which you invited counsel to state their differences, if any, "As to Goerig and Philp's liability to Schaefer, and while it might seem at first blush that that is unimportant, I think that it might very well be, because this is a close case, and these questions are close and in some respects novel ones; and [42] if the appellate court should hold that the bonding company are not liable, then I think the question of whether Goerig and Philp are bound would be important." Cited only for the purpose of showing the nature of the case as your Honor reviewed it at the time.

On page 62, beginning at line 4, your Honor still speaking: "I think the conversations, taken with the continuing breach by Mr. Macri, and his conduct, gave rise to a situation where Mr. Schaefer was entitled to compensation for the fair and rea-

sonable value of his services, and the services were rendered after the termination agreement. I know it's close, but I'm still of that opinion. My statement, by the way, that there hadn't been substantial performance by Mr. Schaefer, I didn't mean to say that Mr. Schaefer didn't do everything he could up to that time" and so forth. Now we go ahead to the next page and we find there the title of the case again, civil action 246, and again of course Continental Casualty Company's name appears as one of the defendants. Then if there's any question as to who appears for the Continental Casualty Company and who handled that litigation, page 63, line 17, there the judgment recites "the Continental Casualty Company appearing by its attorney, Eugene D. Ivy." On the next page, 64, we have at line 7: "It is further ordered, adjudged and decreed that the defendant, Continental Casualty Company, an Indiana corporation, have and recover [43] judgment against the defendants, Sam Macri, Joe Macri and Don Macri, A. J. Goerig and Clyde Philp, and each of them, in the amount of \$56,764.97" and so forth.

Then on the next page, 65, we have a motion for a new trial filed by Continental Casualty Company; copy of the motion is recorded, referring to pages 115 and 116 of the transcript. That's the motion for the new trial. The Continental Casualty Company's name of course appears there because it was the one appealing. On page 66 one of the statements is "That the court erred in entering judgment against the defendant, Continental Casualty

Company, for any sum in excess of \$2656.46.” Then we have on the next page, 67, 5-20-1947, the date Continental Casualty Company filed notice of appeal. Goerig and Philp filed notice of appeal on the 29th day of July. Macris filed on the 18th day of August, and Continental Casualty Company filed its supersedeas bond on the 26th day of May. In other words, the Continental Casualty Company was the first to make its appeal, on the 20th day of May, 1947, and of course the question was the question which your Honor has said a number of times in your statement was a close question and a close case.

Going then to page 74 is the next time that Continental Casualty Company is mentioned. There we find the appeal to the Court of Appeals, on line 7, Continental Casualty Company, a corporation, vs. M. C. Schaefer, et al, United States Court of [44] Appeals for the Ninth Circuit, Excerpt from proceedings of Tuesday, October 19, 1948, before: Denman, Chief Judge, and Healy and Bone, Circuit Judges.” This was the order of submission, and Mr. Hutcheson appears for the appellant Continental Casualty Company, Mr. Holman appears for Macri and Company, and Stuart W. Hill and Harry L. Olson, counsel for appellee Schaefer.

Now, the opinion that was written, in the middle of page 75, line 18: “Continental’s appeal urges these grounds and, in addition, that in any event a surety under the Miller Act is not liable for more than the value of the labor and materials to be supplied under the contract.” In other words, they

raise the point directly that was a point in issue in the case as it was tried before your Honor. Page 77: "On the issue of the Macris' liability to Schaefer, we think that the Washington law should govern. While federal jurisdiction is conferred by the Miller Act and not by diversity of citizenship, we feel that the reasons underlying the doctrine of *Erie Ry. Co. v. Tompkins*, 304 U. S. 64, are applicable here, where the issue does not involve construction or application of a federal statute."

Now, dropping to line 21, the next paragraph: "On the issue of Continental's liability on the payment bond, the federal law should control because the determination of the extent of the liability involves the construction of a federal [45] statute, the Miller Act, under which it was created." And so they accept jurisdiction of the case as being a case that involves the construction of the Miller Act with respect to the payment bond. Then there are the proceedings set forth, a number of pages, until we come to page 85. Line 1: "5-14-49 Continental Casualty Company filed their petition for writ of certiorari in the Supreme Court of the United States." "10-10-1949 Continental Casualty Company's petition for rehearing on the order denying their petition for certiorari was denied." "11-4-1949 Plaintiff accepted Continental Casualty Company's draft in payment of the judgment on job specification #1062."

That brings us to the payment. If your Honor please, all the way through Macri Brothers was carrying forward litigation contending for the posi-

tion which Macri Brothers had taken from the start, under the direction of their attorney, Tom W. Holman, plus their Portland attorneys. Now, all the way through that litigation it is our contention that your Honor can't find a conspiracy statement in there, nor can you find an overt act done in furtherance of any conspiracy to deprive anyone of his rights. A month before the statute would run under the Miller Act Mr. McKelvy told the plaintiff he could not prosecute the suit, gave him the name of an attorney, he went to the attorney, the attorney prosecuted the suit, carried forth the questions of the different viewpoints, [46] prevailed in the suit, received a judgment, and then the judgment was paid.

Where was the damage? I think your Honor gave, I know your Honor thought you did give the plaintiff every dollar that he was entitled to, and that judgment then, entered after the trial of the case which your Honor very frankly stated was a close case, that payment of that judgment gave the plaintiff all that he was entitled to. Suppose there had been a conspiracy? Suppose there had been an overt act? What could your Honor give to this plaintiff? One million dollars, as is requested here, without any statement as to what the damage was, how he was damaged? And then the last statement that we have as far as the plaintiff is concerned here pertaining to this matter is that he did insist upon the Continental check which carried the indorsement, beginning with line 14, on page 85, after stating they had received the check, "the following

is a copy of the statement on the back of said draft as first presented to plaintiff and the three words shown underscored are the words x'd out before said draft was accepted by plaintiff: 'Received of Continental Casualty Company the sum of \$66,-306.48 in full payment and satisfaction of judgment, interest, costs, etc.'" Now, your Honor had entered the judgment allowing the amount, allowing costs, and certain items, so that all were intended to be covered; finally I presume that the parties agreed that the [47] word "judgment" might cover the whole thing.

Now, on page 87 we find that the plaintiff now makes his statement to Mr. McKelvy of why he's bringing this suit, line 16: "I asked him into a rear office, and then told him that I was not thinking about it at present, and that I was going to start a damage suit to find out whether or not a bonding company and others could give us such a run around."

Then on line 24: "I said, 'Well, I want to see what the score really is. I've gotten the run around for a long time and I would like to find out why I was led right up to the brink where I only had about a month left to file our suit, and at that time at that meeting at your office I was pushing you to get the suit filed, then you said—"We can't represent you in a suit against Continental Casualty Co. as Continental Casualty Company is one of our largest accounts.'"

I believe I have given your Honor every place and every instance that the Continental is men-

tioned. If I've omitted anything it's been an error of omission, not intention. It seems to me the case is simple. Was there a definite agreement? Where in this complaint can you find an allegation of a definite agreement between these parties as to what they were going to do to deprive this man of any rights or any privileges which he might have? Second, what part did Continental Casualty take? When did Continental Casualty speak? When did Continental Casualty do anything that would bring them [48] into a conspiracy agreement? When was there an overt act? Because I grant if there were a conspiracy agreement the act of any one of the conspirators, of course your Honor should know full well, would be an act for which each conspirator would have to respond. Where was the overt act, granting that there might be a conspiracy, where was the overt act by any conspirator where any unlawful thing was done or any lawful thing was done in an unlawful manner? Where is it? It's just not alleged.

Then finally, what are the allegations of damage? Your Honor certainly is not going to entertain a complaint with just the statement, "Well, I suffered damages by reason of all this, by reason of the delay that I was put to in getting my money, by reason of not getting my complaint filed before the period it was filed, although it was filed within time." Mrs. Curry read to your Honor from the transcript before Judge Lemmon. I just want to show your Honor the kindness with which this man was treated: "In granting the motion, I would

also grant you time within which to file an amended complaint, if you can, setting forth and overcoming this question of the plea of the statute of limitations. If you did that, you should go into your complaint and set forth, first, the agreement between the parties—the unlawful agreement—when it was entered into and what were the terms of that agreement; what did these defendants agree to do—and [49] then set forth what they did in furtherance and in carrying out that agreement; and then you should allege from that the damages with connection between the act done or the acts done and the damage. You see, in your complaint, now, you don't definitely and unequivocally allege an agreement which precedes any of these acts done. There is no allegation in here what the agreement was. Toward the end you say that certain damages were sustained as a result of the concerted action. But a concerted action may result in damage and still not be actionable."

In other words, though these folks moved in parallel lines with concert all the way through, unless there was a conspiracy agreement to rob this man of some right, or some overt act done that did do so after an agreement was reached that they would do it, the fact that they moved in parallel lines and concerted actions would have certainly no effect, and I don't believe that your Honor can find that the prosecution of this case on this question was any kind of an overt act that would indicate that it was in furtherance of any conspiracy, or that it was unlawfully done in a case where there's

as much doubt as to the rule to be applied to cause your Honor after hearing the entire case to comment as your Honor did, certainly is a case that very often the courts invite an appeal to determine.

I very much appreciate the courtesy your Honor has shown [50] me.

Mrs. Curry: May I interrupt? You made an inquiry about the statute of limitations, and I knew there was a case available. May I give it to you?

The Court: Yes, surely.

Mrs. Curry: It's the case of Northern Kentucky Telephone Co. vs. Southern Bell Telephone Co., 73 F. 2d 333. It's from the Sixth Circuit, and quoting that just to this extent: "A necessary corollary to this rule would seem to be that when there is an overt act or the last of a contemplated series of overt acts, the cause of action accrues and the statute of limitations begins to run."

Mr. Egan: May it please the Court, my name is Granville Egan, your Honor, and I represent the defendants Macri. As the Court knows, I did not appear before your Honor in Yakima.

The Court: Yes, Mr. Holman was there.

Mr. Egan: And I know, of course, very little about what went on at that time, except that my clients, your Honor, feel that you gave the plaintiff every opportunity and every right that he was entitled to in that action. I am completely at a loss to know why the Macris are defendants herein unless it is an attempt to tie the case together between Mr. McKelvy and the Continental Casualty Company, because as your Honor reads the complaint you will

find that while there are disputes and conflicts existing prior to the filing of the complaint [51] in Yakima, in December, 1945, there is no allegation after that period of time of any actions on the part of the Macris of any unlawful act or any lawful act wrongfully done.

The complaint, your Honor, is a recitation from that time on of the proceedings in court and reciting simply that the Macris are the defendants and the proceedings as they went on.

Now, your Honor, we have spent considerable time here this afternoon. I would like to adopt the arguments of my two predecessors, because I think that they called the points to your attention very well. My clients feel it strange that a litigant should break them in one instance and then continue after them after he has exacted his pound of flesh. Perhaps we feel a little more bitter about this, your Honor, than the others do, and perhaps we do not have as much patience as we should have with a man bringing his own action in this. The record, and I'm not going outside the record, your Honor, will show that the Continental Casualty Company paid the judgment in this instance, took judgment over against my clients, and that that judgment remains unsatisfied, and I simply wish to repeat what I stated to you in the first instance, your Honor, that there is no allegation of any kind in this complaint of anything wrongfully done, lawfully or unlawfully, or any unlawful action performed in any manner after the filing of this complaint in December, 1945, and I [52] submit that

any action that took place prior to that date, your Honor, is satisfied by the judgment.

The Court: Mr. Schaefer, this situation here is an unusual one and one that is always difficult for a court, at least I have found it difficult, where a litigant is bringing his own case and is not represented by an attorney. I think the courts have been particularly careful to see that justice is done so far as it's possible in a situation of that sort. However, we have to follow the rules of law, of course, and apply them whether or not a litigant is represented by an attorney. I have this thought about it: I'm not trying to cut you off from argument, but it's inevitable in a situation of this sort that a layman litigant is not able to give the court very much help so far as the applicable law is concerned, and your facts are set out here pretty thoroughly. I assume that you put in everything you thought you had in the 90 pages of this complaint?

Mr. Schaefer: Practically so, yes.

The Court: And this is rather an emergency assignment, Judge Leavy is ill and there's a vacancy here in the Federal District Court in this district, and I came over here without as much prior notice or preparation as I ordinarily would have. The result was I didn't have an opportunity to go into this file or see it before today, and it's too voluminous for me to have gone through it in the time I had, and while I [53] dislike taking cases under advisement, I have gotten so busy I can scarcely afford the luxury to do so any more, I think I should take sufficient time, I haven't in mind writing an

opinion for the Federal Supplement, but to read the original complaint and read what Judge Lemon says about it, and what he did, and then the amended complaint and consider the arguments and the authorities that have been submitted, and any I might be able to find, in determining whether or not you stated a cause of action. I thought I'd let you know that's what I have in mind, and then I would welcome any argument you have at this time.

Mr. Schaefer: I appreciate that very much, your Honor, and I am quite concerned that you should have the opportunity to go through and really digest the whole of the file, because I understand it to be this way, that the attorneys in the opposition would take those parts of my complaint and cite those to you that are most favorable to themselves and their clients. I do have a few memorandums, Memorandum of M. C. Schaefer resisting motion of defendant, W. R. McKelvy, to dismiss plaintiff's amended complaint, and then there is——

The Court: Do you wish to submit that?

Mr. Schaefer: Yes, I would like to give you a copy of it.

The Court: Do you have copies for the attorneys?

Mr. Schaefer: No, I haven't.

Mr. Croson: No objection on our part. [54]

Mr. Egan: On the part of the defendants Macri, your Honor, there will be no objection to the court considering it.

Mrs. Curry: I'll reserve my stipulation on that.

The Court: I might say, I think they should be

put in the file and be available to counsel if they wish to look at it.

Mr. Croson: I assumed so.

The Court: And I'll say this, if I think there is anything in there that is very persuasive or might be controlling I'll take it up with counsel before acting on it. I don't know what it is; if there are authorities I take seriously, I think I should give you an opportunity to analyze them.

Mrs. Curry: Could not we look at it quickly before it goes in?

The Court: Yes.

Mr. Schaefer: On this my idea was to hand you a copy so if in my reading before the court I make any errors you would be able to check the errors.

The Court: How many pages are there?

The Clerk: About ten pages altogether.

The Court: I didn't understand; what Mr. Schaefer proposes to do is read it, and he's giving me a copy so I can more readily follow it.

Mr. Schaefer: That was it. If you had in mind you would read all of it—— [55]

The Court: If it's only ten pages you may read all of it.

Mr. Schaefer: I'm reading the memorandum of M. C. Schaefer resisting motion of defendant W. R. McKelvy to dismiss plaintiff's amended complaint. The amended complaint should be sustained because——

The Court: Mr. Schaefer, you have different ones here for different defendants?

Mr. Schaefer: I hope to have these apply to all defendants.

The Court: I know, but you labeled them differently, and I wasn't following the right one. Go ahead.

Mr. Schaefer: The statute of limitations does not bar this action. The running of the statute of limitations in a civil action for conspiracy has not been the subject of judicial determination in many instances. However, in *State vs. Arkansas Lumber Company*, 260 Mo. 212, 169 S.W. 145, the Court held that the statute commences to run as of the date of the last overt act under the conspiracy. Also in *Montgomery vs. Crum*, 199 Indiana 660, 161 N.E. 251, the Court also held that in an action for damages resulting from one continuous wrong extending over a period of years the statute of limitations does not begin to run until there is a cessation of the overt acts constituting the wrong. To the same effect also is the holding in *Clark vs. Mochetti*, 92 Colo. 365, 21 P. (2d) 182; 41 Hun. 645, 3 N.Y.S.R. 309. [56]

In *Northern Kentucky Telephone Co. vs. Southern Bell Telephone Co.*, 73 F. 2d 333, 97 A.L.R. 133, is an exhaustive opinion citing the rule in civil conspiracies, and holds that the statute begins to run as of the last of a contemplated series of acts and further holds that the act of one conspirator is attributable to all after the formation of the conspiracy and during its existence. See also the annotation in 97 A.L.R. 137.

It must also be noted that in this action the Fed-

eral Court will ordinarily apply state rules as it is a case where jurisdiction is based on diversity and on amount. No decision can be found wherein the Supreme Court of the State of Washington has ruled on the point involved here and none is cited by defendant. The case relied on by defendant, that is, *Mitchell vs. Greenough*, is one in which the overt act clearly occurred beyond the limitation period; here, however, there are acts alleged within the limitation period and within a few months of the filing of plaintiff's original complaint.

The complaint does allege a concert of the parties to accomplish either an unlawful purpose or a lawful purpose unlawfully. In 168 P. (2d) 797, *Lyle vs. Hoskins*, the Washington Supreme Court laid down the rule that allegation of a conspiracy and proof thereof by circumstantial evidence is all that can be required due to the very nature of the offense and that direct and positive allegation and proof is not [57] required.

Here plaintiff alleges in Paragraph III, beginning line 23, page 1, that between 3-2-44 and 8-18-50 defendants did wrongfully and maliciously conspire, combine and confederate together with willful and malicious intent to injure and damage plaintiff, and that as the direct and proximate result of the overt acts committed pursuant thereto (which said acts are alleged in detail in the pages following) plaintiff suffered the damages more fully alleged in Paragraph IV, line 9, page 92.

The principal allegations of conspiracy are that the defendants Macri on 12-7-43 signed a govern-

ment contract with the Bureau of Reclamation for certain work on the Roza Irrigation Project near Yakima, Washington, and on the same day defendant Continental Casualty Company by the agent and attorney in fact, the defendant Clyde Philp, issued the performance and payment bonds required by said Bureau of Reclamation, but only four days later on 12-11-43 this same Clyde Philp, together with defendant A. J. Goerig, entered into a silent partnership agreement with each other and also as joint venturers with defendants Macri in the performance of said general contract with the Bureau of Reclamation, none of which facts were known to plaintiff until 1946;

That plaintiff on 3-14-44 entered into a subcontract with defendants Macri to do certain form, steel and concrete [58] work on said Roza Irrigation Project, under which certain preparatory work was to be done and certain materials were to be furnished by defendants Macri (Items 1 through 5 of specific allegations under Paragraph III);

That defendants Macri purposely defaulted in the furnishing of material and performance of their preparatory work from 3-14-44 to 7-31-44 so that plaintiff could not commence pouring until 7-31-44, for the purpose of causing plaintiff to become bankrupt and to cause plaintiff severe financial hardship and in fact did cause severe hardship and almost caused bankruptcy.

On 7-31-44 defendants Macri then agreed orally to expedite their work so that plaintiff could complete his by 9-15-44, but again from 7-31-44 to

10-31-44 the same willful defaults were committed by defendants Macri and they further violated their contract with plaintiff by further refusing and failing to make payments to plaintiff as required by the terms of the subcontract with plaintiff.

On 11-1-44 defendant McKelvy became a member of the conspiracy. On that date plaintiff employed defendant McKelvy, made full disclosure of the acts of the defendants Macri, supplied him with memoranda of the conversations and meetings and oral agreements with said Macris, that defendant Continental Casualty Company might be involved; and sought the services of defendant McKelvy to terminate the said [59] subcontract with the said Macris and sue for the reasonable value of the work done by plaintiff.

That the firm of which defendant McKelvy is a partner, at that time and for years before and since, represented defendant Continental Casualty Company, but despite the conflict of interest, defendant McKelvy made no disclosure to plaintiff that his firm represented Continental Casualty Company; and plaintiff did not discover this fact until much later; that defendant McKelvy accepted plaintiff's employment and agreed to take steps to accomplish the desired result, by negotiation if possible and by suit if necessary. By interoffice memorandum dated 11-8-44 (photostat at end of item 16 following page 20) defendant McKelvy by his own handwriting—now, on that I probably want to make a correction; it may not be his handwriting, but it is handwriting from his office—indicated he felt there

was a good cause of action and that the remedy was in quantum meruit;—

The Court: Of course, your statement or the memorandum is, I presume, your conception of what you've alleged in your complaint. Of course, I have to be governed by what you've set out in your complaint. I'm just trying to visualize in my own mind what you claim this conspiracy was. I recognize the fact that you don't have to prove that the defendants got together and made an agreement as people do if they're selling horses or renting real estate, that a conspiracy is a sort of [60] a back-alley basement affair, usually, and can be proven by circumstantial evidence, but you have to show either directly or circumstantially that there was an agreement between them, an unlawful agreement to do something to damage you here. Now, it's your position that Macri failed to comply with his part of the contract and was slow in doing it in order to injure you by causing you to become bankrupt?

Mr. Schaefer: That is it, your Honor.

The Court: And is it your position that there was a preconceived arrangement between Macri and his bonding company that Macri should hold back, slow up, and bankrupt you? Is it your contention that the Continental Casualty Company agreed to that beforehand?

Mr. Schaefer: Not beforehand, your Honor, but McKelvy became a party, and in behalf of Continental Casualty Company—

The Court: You don't say so. All that you allege here is that you tried to hire him to bring

a suit against Macri, and you found out afterwards, you say, that he couldn't do it because Continental Casualty Company was one of the clients of his firm.

Mr. Schaefer: That's right.

The Court: But there was no allegation that he represented them in this particular case or this particular controversy or suit. Of course, he couldn't represent them, because you hadn't brought the suit yet. [61]

Mr. Schaefer: No, but he agreed to handle the suit, to carry the suit as against the Macris and Continental Casualty Company, and then he did not disclose to me that he represented them until——

The Court: I know what you claim, but when you went to see him how did he enter an agreement with Continental Casualty Company and Macri to ruin you by holding back on Macri's performance?

Mr. Schaefer: That is circumstantial.

The Court: Extremely circumstantial, I should say. Is it your position that after you went to see McKelvy and tried to get him to represent you, that he went then and talked to Continental and Macri and got into this scheme to ruin you and entered it and became a part of it then?

Mr. Schaefer: I claim that it was he, that by not bringing this suit as he had agreed to do in the first place, and the information and advice that he had given me during the course of his employment by myself, that he afforded the opportunities to the Macris and in behalf of the Continental Casualty so that they could bring this suit on contract number 2 down here in Portland, and the delays caused

out there on the job. Had, for example, had McKelvy started suit against the Continental Casualty Company, or had he informed me when I first employed McKelvy, had he then informed me that he represented Continental Casualty Company and handled all their work in the State of Washington except that as their office dished out to some other attorney to handle them, I would have certainly gone to some other attorney and we would have filed this suit and it wouldn't cost me some better than \$44,000 out of pocket money to handle this suit that was handled at Yakima.

The Court: Do you think somebody else could have handled it more cheaply than Mr. Olson did?

Mr. Schaefer: The thing is that Olson didn't get into the picture.

The Court: How much delay was there because of your going to Mr. McKelvy?

Mr. Schaefer: McKelvy delayed from the time I employed McKelvy, was I believe November 1, without looking at the record. November 1, 1944, to October 20, 1945, and that was after the work had been completed, so we hadn't yet done a third of the work on the job when McKelvy knew all the facts.

The Court: Of course, you had suits pending here and one in Portland and one in the Eastern District of Washington, and they finally were tried out in the Eastern District of Washington?

Mr. Schaefer: That's right, your Honor.

The Court: It was a very complex series of

cases, not only this one but others involving the Continental Casualty Company, and most of them were settled in pre-trial conference. [63]

Mr. Schaefer: That was with other parties.

The Court: Yes, but it necessarily took quite a long time to try out. It's your position that these proceedings in the Eastern District of Washington continue to constitute overt acts, that is, the proceedings that a defendant and a plaintiff would normally go through in an ordinary lawsuit, that every time the defendants did something over there it was an overt act?

Mr. Schaefer: Yes, it is.

The Court: In other words, an appeal taken by the Continental Casualty Company was an overt act?

Mr. Schaefer: Mainly on the basis here that McKelvy, through McKelvy's neglect to handle the case or to inform me in the first instance that I should get another attorney.

The Court: This I must say is a unique and a very unusual experience for me. It's difficult for me to understand, but I'm trying to get your point of view. Here's a case that was a very close and difficult one, I think. I happen to know Mr. Olson was very much concerned about it and didn't think his chances were too good of winning in the Court of Appeals; I thought the chances were not much more than even. I wouldn't have bet one way or another what the Court of Appeals would have done. You were well represented. Mr. Olson presented the case very well. Mr. Holman, of course,

was an excellent lawyer and made a good presentation on the [64] other side. I couldn't see any indication of the slightest conspiracy. I thought it was a hard-fought, close lawsuit in which I might just as well have found against you as for you, it was that close. You got almost a perfect result, and here I find you suing the losers and the attorney for a million dollars. It's a queer situation. I think perhaps you've come to the realization which many litigants don't, that litigation necessarily and unfortunately is expensive, and that it isn't as profitable even for the winner as is sometimes thought. Now, I don't know; you think here that Mr. McKelvy and the bonding company and Mr. Macri conspired to hold up this performance and ruin you and bankrupt you?

Mr. Schaefer: That's right.

The Court: You really think that, huh?

Mr. Schaefer: I really do, and I believe you'll come to the same conclusion after you've read all of it.

The Court: Well, I'll read it, but I don't see how you can contend that when you bring suit against a bonding company and a prime contractor that they haven't got the right to defend that action. I would have thought, frankly, that these attorneys who defended the case, Mr. Holman and Mr. Ivy, I would have thought they weren't doing their full duty if they hadn't defended as they did and if they hadn't taken an appeal, because I thought as a former lawyer and a judge that it was close enough there should be an appeal. I couldn't [65]

see any indication that anybody was trying to conspire against you. I didn't think your skirts were any too clean either, although I thought the balance was in favor of you against Mr. Macri. I'm talking very frankly, and I don't suppose I have a right to take into consideration what I know about the lawsuit, but that's the way I regard that lawsuit. I'll limit myself to what you have here that I said in the lawsuit. Go ahead.

Mr. Schaefer: I was on page 4, I believe. I don't know if I can get back to just where I was on that. Defendant McKelvy by his own handwriting—which I then corrected—indicated he felt there was a good cause of action and that the remedy was in quantum meruit; yet the circumstances and facts alleged in items 6, page 5; 8, page 6; 17, 18, 19, 20, 21, 21A, on pages 22, 23, 24 and ending top of page 25; and particularly in item 24, page 25; item 25, page 26, clearly show that the advice given and actions taken by defendant McKelvy were all intended to and in fact did protect McKelvy's client, Continental Casualty Company, and also the Macris, and were intended to and in fact did further injure and damage plaintiff in that defendant McKelvy first prevailed upon plaintiff to complete the work rather than rescinding or terminating the contract; by not terminating the second subcontract he made it possible for the totally unfounded suit in Multnomah County, Oregon (item 28, page 28). [66]

The Court: Why do you say that was a totally unfounded suit? Wasn't there a dispute between you and the Macris at that time?

Mr. Schaefer: There was a dispute.

The Court: You think only you had the right to resolve that into court by filing an action?

Mr. Schaefer: No; in this way, that McKelvy was informed and had the information of Macri not having prepared his own work, and his specification called for a contract with the Bureau of Reclamation, called for him to start work within thirty days after the signing of the contract, and it was I believe somewhere in the neighborhood of ten months before Macri started any performance on that job, and Mr. McKelvy's office had written a letter——

The Court: He claimed he had a very difficult time getting materials, didn't he? That was at a time when materials were scarce?

Mr. Schaefer: Well, he claimed that, but as the Bureau of Reclamation said, all other contractors were ahead of their work, and he was far behind.

The Court: But at any rate there was a controversy, and Macri started a suit against you in Oregon, and Mr. McKelvy didn't act as his attorney in that, did he?

Mr. Schaefer: No.

The Court: That was Mr. Holman. [67]

Mr. Schaefer: Had he sent that letter it would have been a whole lot of proof against the contentions, and against the condition that existed out there on the job, and which letter he stated wasn't sent.

The Court: I'm trying to get at your point of view, Mr. Schaefer. It seems to me your complaint

indicates that you allege certain things, that Macri was slow in getting started, and that he held back his performance, and then McKelvy failed to disclose to you that his firm represented or at least they had some arrangement to represent the Continental Casualty Company, and held you up in getting your suit started, and that this suit was brought over here by you against Macri and the Continental, and that certain proceedings went on in that up to the time they paid you the judgment, but what is there to connect these things together and bind them together into an agreement between these defendants? Where and when and what did they do against you that is the basis of this million dollars in damages?

Mr. Schaefer: I think that from going down through the complaint, which is the thing that I had thought you had indicated that you would want to read——

The Court: Well, yes, I'll do that, but where in the complaint—you've only alleged it in general language, haven't you?

Mr. Schaefer: It is the different steps as the sequence, [68] as you go down through and take the different dates and different actions taken at different times, it will just draw that kind of a picture. It's a conclusion that, as I see it, that one would have to come to, that there was that conspiracy. Therefore I figured that in reading this to your Honor, and then in having that to go over the complaint and the whole file, that you will see exactly what I'm referring to, what I mean by it.

The Court: The difficulty is here, of course, that most of these things you've alleged as overt acts do not, because of their nature, carry any inference that they were the product of a conspiracy or that they were intended to do you injury. If there are certain types of unlawful action you can show have been taken, of course we might assume, since there is a concert of action and these things were done in the way they were, we can relate them back and say "These people must have intended the consequences of their unlawful and improper acts," and we can assume they must have conspired; but here you've got a perfectly natural and normal sequence of events, that a subcontractor got into a disagreement and a jam with his general contractor, here's a bonding company that stands off in an ordinary way, you went into court and it was determined and the defendants appealed, as they had a perfect right to do, and tried to get certiorari, and finally paid you the judgment. You won the lawsuit and they lost. [69] Aside from that is this difference with Mr. McKelvy that came after you claim the Macris tried to damage you. The fact a busy lawyer in a large firm may have overlooked the fact that he had some conflict of interest there, that is the only thing you've got, as I see it, that wouldn't be in the ordinary course of this kind of a transaction.

Mr. Schaefer: Well, if it were that Macri went broke and bankrupt and the Continental Casualty Company was to foot the bill, it surely was to the Continental Casualty Company's interest that Mc-

Kelvy represent me in the way that he represented me.

The Court: What did that serve them? They lost the lawsuit and they had to pay. What good would it do them whether you went broke or continued to be prosperous? They had to pay the full amount of the judgment, on their bond.

Mr. Schaefer: They did later, yes, after I had employed another attorney.

The Court: Well, if the Continental Casualty Company had made a deal with McKelvy to block you out of court, don't you think they'd have blocked you another month, until your statute of limitations had run, the one-year statute under the Miller Act? McKelvy must be a very bungling conspirator if he doesn't hold you up another month and keep you from going into court, when he tells you you've got a month left and you go get another attorney and start your suit. A prime [70] contractor doesn't delay performance at the beginning of the contract in order to ruin a subcontractor, and of all things, a bonding company wouldn't conspire with the main contractor and say "you hold back and we'll fix this fellow Schaefer, we'll break him." Do you think the Continental Casualty Company would do that? That's what you're claiming, although I don't think you allege it in your complaint.

Mr. Schaefer: I'm saying they went along on it. I'm not saying the Continental Casualty Company got into a meeting with McKelvy and the Macris and Philp and Goerig and said "We're going to break Schaefer," no. The thing is that it so hap-

pened the circumstances worked in together to bring that about, or practically bring that about.

The Court: It happened that your unfortunate experience with McKelvy, the delay in Mr. Macri's performance, the things that the Continental Casualty Company did in contesting this lawsuit, all of them turned out to injure you very greatly, but that doesn't make a conspiracy unless there was an arrangement and an agreement between them beforehand to do that sort of thing.

Mr. Schaefer: And a conspiracy, I think I have more of such law cited in here.

The Court: All right, go ahead. Let's see, I think you were on page 4. I'll try not to interrupt you too much.

Mr. Schaefer: Further in that he made possible the [71] asserted dissipation or rumored possible secretion of assets by defendants Macri, and thereafter advised plaintiff to follow a course of action amounting to fraudulent conveyance of assets with possible criminal overtones, and finally when none of these succeeded purposely attempted to permit plaintiff to delay filing suit against defendants Macri until the statute of limitations had run, and but for the diligence of plaintiff might have succeeded in any one of his efforts.

That defendants Macri then furthered the conspiracy by filing a malicious suit in Portland which was completely without foundation and known to be so and intended to dry up plaintiff's credit and thus render impossible the prosecution of his suit in Yakima, Washington; that their action in Port-

land did dry up his credit, and only by the most extreme application of perseverance could plaintiff survive at all in his business operations there, and even yet has not fully recovered from the effects of said suit and has lost large sums of money as the direct result thereof.

Finally after trial of the Yakima suit by another attorney (who did what McKelvy had agreed to do), the defendants Macri and Continental Casualty Company by unfounded actions and by abuse and misuse of the judicial process, all in furtherance of the original conspiracy, dragged the matter on through separate appeals and willful delays in making settlement after final judgment on appeal to 11-9-49, and on 8-16-50 [72] defendant McKelvy again entered the picture by trying to pressure plaintiff into making any kind of payment on his bill to plaintiff to preclude the filing of the present case.

In the light of all authorities cited by defendant and of *Lyle vs. Hoskins*, 168 P. (2d) 797, *supra*, it is abundantly clear that the web of intrigue, conflicting interests, and inter-related activity of the several parties defendant, that the wealth of detail alleged in support of the general allegation of a conspiracy to damage plaintiff amply support plaintiff's allegation, prevents its being a mere conclusion and is necessary in order to state a cause of action.

As to defendant's objection that the complaint is verbose, the authorities and argument last above are sufficient to meet this objection, as such alle-

gation of the specific statements, omissions and actions is necessary to state a cause of action. In the motion of defendant to plaintiff's first cause of action the position taken was that the complaint contained merely conclusions and not ultimate fact from which the conclusion could be drawn. Now that plaintiff alleges the facts in detail to support the conclusion he seeks to have them stricken as being prolix and verbose. Plaintiff contends that the facts as stated are necessary and proper.

As to item 4 of defendant's motion, there is a misconception of plaintiff's allegations. Plaintiff alleged only that the firm of Skeel, McKelvy, et al., represented [73] Continental Casualty Company at the time defendant McKelvy was employed by plaintiff and continued thereafter to represent them and in fact represented defendant Continental Casualty Company on the first day of the trial of plaintiff's case vs. Macris and Continental Casualty Company in Yakima, as more fully appears from the transcript set out in full. Thereafter it is admitted that at least of record in that case other counsel represented Continental Casualty Company and there is no inconsistency whatsoever.

The Court: I'm not sure yet whether you claim that Mr. McKelvy represented the Continental Casualty Company in your suit against Macri. He didn't appear of record, or I mean his firm didn't appear of record in that suit, as I recall. Mr. Ivy represented the Continental Casualty Company in that case.

Mr. Schaefer: He did later, yes.

The Court: Later? I thought he appeared there the first day that we had the pre-trial conference.

Mr. Schaefer: The first day that I was in court, yes, that we were in court, Ivy was there. I believe the date of our case was set for the 20th of February, or something like that, and then it was changed over to the 24th, and this other matter come out on the 21st.

The Court: Well, at any rate I don't suppose it's necessary to discuss it, because I'll check through and see what [74] your allegation is and what this file shows, that's what I have to be concerned about. What do you have there, the record of the case in the Court of Appeals?

Mr. Schaefer: Yes.

The Court: Does that show an appearance by Mr. McKelvy?

Mr. Schaefer: 2239, and then on page 2246 you'll note what Mr. Skeel has to say, and also Mr. Holman.

Mrs. Curry: Your Honor, that was the transcript of the evidence in the use cases, which on stipulation was incorporated in your case, or in Schaefer's case. They just took out a part of the records of the case that we were representing the Continental Casualty, to save time, and I call your attention that there is this—I don't know whether it's a misprint in that transcript or not, but it does show Schaefer vs. Macri, number 246, then it goes on and incorporates that part without any preliminaries, that part of those use cases, and Mr. Taylor some time ago made a transcript of that, and I'd

just as soon file that here as a part of this now, but that transcript will show that pages before that the proceedings were all ended. That was like an exhibit.

The Court: Yes, I notice that Mr. Hawkins seems to be the attorney in this matter. There were several of those cases, and the Continental Casualty Company was interested in the use cases as well as your case. All right, go ahead.

Mr. Schaefer: Now, I did not take note of just where I [75] cut off there.

The Court: You finished the other one, I thought, this memorandum that you have in resistance to McKelvy's motion to dismiss.

Mr. Schaefer: Yes; now then, I didn't get started on plaintiff's statement resisting alternate motion of defendant McKelvy to strike.

The Court: All right.

Mr. Schaefer: The record shows on its face that Mr. Skeel, of the firm of Skeel, McKelvy, et al., did represent Continental Casualty Company in plaintiff's case, No. 246, in Yakima on the first day of the hearing and that thereafter other attorneys appeared. No argument is necessary, as the record speaks for itself.

Line 12, page 28, was an attempt on the part of plaintiff to plead that the suit filed in Multnomah County, while admitted of record only by the defendants Macri, was in fact the act of the other defendants as well, and as such should be permitted to stand.

The Court: What significance do you attach to

the fact that Mr. Skeel appeared over there representing the Continental Casualty Company?

Mr. Schaefer: To the greater amount, we'll say, that the office—to give proof that the office of Skeel, McKelvy, Henke, Evenson and Uhlmann did represent Continental before [76] and during my suit as against the Continental Casualty Company, so they were the agents for other matters, they were the agent for Continental Casualty Company, and that coupled with other matters that I have expressed in my complaint there wherein Mr. McKelvy told me that they handled—that Continental Casualty was one of their largest accounts, and that they practically handled all of Continental Casualty Company's legal matters in the State of Washington, so in this case here, after——

The Court: Well, you still contend that they appeared for one day in this case of yours against Macri in Yakima?

Mr. Schaefer: Yes, bringing that into the picture mainly for showing that they were representing Continental Casualty Company.

The Court: Why should they appear there for one day and then call Mr. Ivy in after that?

Mr. Schaefer: Well, that, I imagine it didn't look too well that they'd represent Continental Casualty Company after having represented me.

The Court: And they just discovered that or concluded that after appearing one day in court over there for Continental against you, is that your position?

Mr. Schaefer: Well, no, I'm not making that

my position. The other matters were so intertwined with the same matter that we were concerned about—— [77]

The Court: I think you're mistaken about that, Mr. Schaefer. I think Mr. Skeel appeared in one of the other numbered cases in which the Continental Casualty Company was interested, of course, as bonding company for Mr. Macri, but in which you were not the plaintiff. I'll check that up as best I can.

(Short recess.)

The Court: All right, go ahead, Mr. Schaefer.

Mr. Schaefer: Memorandum of M. C. Schaefer resisting motion of Continental Casualty Company to dismiss or to strike. Defendant's proposition of law and citation of supporting authorities is generally conceded to be correct. Plaintiff contends, however, that the facts alleged in his amended complaint do state a cause of action as to defendant Continental Casualty Company.

The essential facts alleged as to participation by defendant, Continental Casualty Company, in a conspiracy to injure, defraud and damage plaintiff, are as follows:

From the inception of work by plaintiff in 1944 on his subcontract ostensibly with the defendants Macri for concrete work at Yakima, Washington, 'til August, 1950, there was a web of intrigue, behind the scenes activity, undisclosed parties whose interests were interlocking with one another and antagonistic to plaintiff. One of the principal participants was Continental Casualty Company. [78]

Thus plaintiff was made the brunt of wilful, malicious and intentional activity—so far as then known—by defendants, Macri, intended to discredit, bankrupt and ruin plaintiff from 1944 when he started work on the Roza Irrigation Project, until 1950. But as the plot unfolded it became apparent that all the initial phases of the common scheme were joined in by Continental Casualty Company behind the scenes and off the record and later Continental Casualty Company led the way.

Through its agent and attorney in fact, the defendant Philp, Continental Casualty Company issued performance and payment bonds, guaranteeing performance and payment by the defendants Macri at the same time the said Philp was also a partner with one Goerig and jointly Philp and Goerig were silent joint ventures with the defendants Macri on this work. Thus all the intentional acts ostensibly of the Macris, were actually the acts of Continental Casualty Company.

Then follows a complex series of actions, by the Macris (and although not at the time known to plaintiff) also by the Continental Casualty Company through its agent Philp and by Philp and Goerig personally attempting to and almost succeeding in bankrupting plaintiff and causing severe loss and damage.

Then there is injected into the conspiracy one W. R. McKelvy, attorney for Continental Casualty Company (again a [79] fact not known to plaintiff until a later date) who advised plaintiff to follow courses of action which show beyond any equivoca-

tion that said McKelvy was working against plaintiff for Continental Casualty Company, Macris and their joint venturers, Philp and Goerig and only by extreme diligence was plaintiff able to prevent all the parties from succeeding in their scheme.

McKelvy also dealt very closely with one Holman the ostensible attorney for the Macris, but who had formerly been associated in the office with McKelvy and who worked in close harmony with McKelvy at all times, including the filing of a totally groundless suit in Multnomah County, Oregon, when it became apparent that all other attempts to bankrupt plaintiff were failing.

With defendant's general proposition of law and his citation in support thereof plaintiff has no serious disagreement. Plaintiff does contend that the facts alleged in his amended complaint do state a cause of action as to defendant Continental Casualty Company. The essential facts, as to this defendant, are:

In 1943 its agent and attorney in fact, the defendant Philp, signs performance and payment bonds for defendants Macri and while still in the employ of defendant Continental Casualty Company its said agent Philp became a partner with the defendant Goerig and Philp and Goerig became silent joint [80] venturers with the persons being bonded by Continental Casualty Company, namely the defendants Macri. All this is known by Continental Casualty Company but not plaintiff until several years later when plaintiff filed a suit.

Then came the suit in Yakima which Continental Casualty Company and the Macris lost and which the defendants Macri did not appeal within the time provided, but Continental Casualty Company did and thereafter the court ruled that the Macris could appeal, despite being barred by the time limitation, since Continental Casualty Company did appeal within the permitted time. At all times thereafter including appeal to the U. S. Supreme Court, Continental Casualty Company led the way on this series of litigation and appeals. It did not follow along with its prime contractor.

Thus, by a series of subversive maneuvers known to and acquiesced in by Continental Casualty Company through its agent and attorney, the defendant McKelvy, and later directly by Continental Casualty Company in leading the way and carrying the ball at all times after adverse judgment in Yakima, defendant Continental Casualty Company was one of the prime participants in and causative factors of plaintiff's damage.

Clearly, while the complaint necessarily is complex and difficult to phrase in a concise manner, it certainly does state facts supporting the general allegation of defendant Continental Casualty Company being a participant in the [81] conspiracy.

As to the statute of limitations point, reference is made to plaintiff's memorandum on McKelvy's similar motion.

As to the objection that complaint is verbose, plaintiff concedes that the law is fairly stated, but maintains that any lesser allegation of details would

possibly defeat the complaint on the grounds that the allegations are mere conclusions, rather than ultimate facts from which the conclusion of conspiracy could be drawn.

The authorities are so numerous that corporations are liable for the torts of their officers, agents and employees as hardly to require citation, but attention is drawn to 13 Am. Jur., corporations, Section 1131, page 1056, which states the general rule and also the rule that specifically as to conspiracy a corporation is liable for acts of its officers, agents and employees in conspiracy with other persons.

As to the amount of the damage, I figured that that was a thing that the proof would be presented on at the time that this case came to trial before the jury, and I might state that I have some inventions that this case has cost me this burdensome amount of money has stopped me from going ahead with those inventions, as well as having kept me in the concrete subcontracting business instead of in the general contracting business. I believe that we'll leave it [82] go at this, and then as you stated, you would read the whole of the complaint and I believe that everything is pretty well stated.

There's one point I might make here yet, and that is that Mr. Olson at the time or before the Macris had filed in the Circuit Court of Appeals and after their time had expired according to our thought in the matter, we called the attorney for Continental Casualty Company and asked him whether or not the Macris were going to file, and they said well, they didn't know, and we said well, you can make

reference to the matters that they indicated in their brief, and this attorney for Continental Casualty Company said "Well, we were probably premature in making that statement," so I think that most everything else is pretty well covered.

I am not an attorney, and I did not know of the term quantum meruit, and I had to find out what it meant after seeing the work in the photostatic copy here, by study. I've been studying a certain amount of law, and you can't get an attorney, and the attorneys that I have contacted have told me "We might represent you, but I wouldn't represent you against another attorney, against a brother attorney."

Now, Olson, which I cited in the last of my complaint here, I cite that I had a telephone conversation with Olson, and Olson said "Why don't you leave McKelvy out; I think you've got a good case against Continental Casualty Company, [83] but I can't represent you on that if you're going to sue an attorney, if you're going to sue McKelvy now; McKelvy recommended me to you," and I said "Well, you shouldn't feel that way about it; I asked McKelvy, I felt a whole lot different than that, but I asked McKelvy whether he could give a good attorney over at Yakima, and he named four, and Olson was the third man named." My idea in asking Mr. McKelvy wasn't to take his advice as much as it was to find out and perhaps do some close checking as to taking some other attorney than named by Mr. McKelvy.

The Court: You couldn't have been too much

dissatisfied at that time, or you wouldn't have listened to him at all, would you?

Mr. Schaefer: Had he named only one or two, I wouldn't have gone to him.

The Court: Since he named more than that, you thought it was all right.

Mr. Schaefer: I had a friend of mine in Portland check up as to attorneys in Yakima, and he felt I should go and see Mr. Olson.

The Court: As I have stated here, I'll go over this complaint and this rather voluminous file and look up the authorities and come to some decision. You're in Portland, aren't you, Mr. Schaefer?

Mr. Schaefer: Yes, your Honor. [84]

The Court: Well, I think perhaps I had just better notify you, then, of my ruling, because I wouldn't want you to make a trip back up here to hear an oral announcement of it. I haven't in mind writing an opinion of the case. I do wish to check over, though, and see what Judge Lemmon's reasons were, and what difference there is between the first and second complaint. I'm going to try to get this done in the next few days, because I have troubles enough of my own in Eastern Washington. I think I'll just write you a letter and let you know what the ruling is, and perhaps the reason. This case naturally was of some personal interest to me because of the fact I had presided in your case over there. The conversations I have had with you aren't going to enter into this case; I realize I'm a visiting judge in this suit and I'm going to be guided only by the file here, your complaint, and

such of my remarks as are included in the complaint.

Mrs. Curry: We have had a little difficulty because of the fact that you judges are here today and gone tomorrow, we had some difficulty getting an order entered before. I couldn't understand the rules; I filed a proposed order and waited fifteen days and then found out that we would have to have it signed when Judge Lemmon was in his hotel room dashing for the airplane. Would it be out of line to suggest today that we might present an order? [85]

The Court: Well, I think that I simply will enter an order and send you copies of it. This isn't like settling findings of fact. These motions will be denied or they will be granted.

Mrs. Curry: We're asking your Honor for a judgment of dismissal with prejudice.

The Court: Well, if your motion is granted I presume you would be entitled to that.

Mrs. Curry: Then we'll have to get a judgment entered, you see.

The Court: Well, I don't know—what are the local rules, Mr. Thomas, about entering judgments? Do they have to give fifteen days' notice?

Mr. Thomas: No, fifteen days' notice is not required, your Honor. You can enter a judgment of dismissal at any time. It was on the settlement of findings of fact I think they were referring to.

Mrs. Curry: Well, that was the only thing I could see that would apply.

The Court: I have required either an endorsement of agreement or an agreement as to form on a finding, but on a motion such as a motion to dismiss I haven't required that; I think it's so simple that it could be done without having the attorneys present.

Mr. Thomas: I think our rule is the same as yours. [86]

The Court: What I usually do is to write out a letter and say that I've come to the conclusion these motions should be granted, or should be denied, and then perhaps give you a reason. In this case I don't think I'd elaborate very much unless I elaborated a great deal, because of the volume of this complaint.

Mrs. Curry: You see, I won't be able to get an order approved as to form.

The Court: No, I know that's true. I started to say what my usual practice is would be to write out a letter telling you the motions will be denied or granted, and that an order in accordance with these views be presented, and all I'll require is a copy be sent to Mr. Schaefer, or he can send copies to you if it's in his favor.

Mrs. Curry: I have a proposed order.

The Court: You have? Well, you might submit it, and give Mr. Schaefer a copy and then I can use that. If Mr. Schaefer has any objection he can write me about it, and send you a copy of the letter. If I decide in Mr. Schaefer's favor that would be very simple; I can enter the order myself that the motion is denied.

Mr. Schaefer: This matter of course on my part has been prepared and my argument here today has been on the basis that more facts would be brought out at trial before the jury.

The Court: Well, I presumed so, yes. All right. The [87] court will adjourn until tomorrow morning at 10 o'clock.

(Hearing concluded.)

Reporter's Certificate

United States of America,
Western District of Washington—ss.

I, Stanley D. Taylor, do hereby certify: That I am a regularly appointed, qualified and acting official court reporter of the United States District Court for the Western District of Washington; that as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, a United States District Judge sitting as a judge in the United States District Court for the Western District of Washington, held on April 16, 1951, at Seattle, Washington.

That the above and foregoing contains a full, true and correct transcript of the proceedings had in the above entitled cause.

Dated this 21st day of April, 1951.

/s/ STANLEY D. TAYLOR,
Official Court Reporter.

[Endorsed]: Filed April 25, 1951. [88]

Chambers of
Sam M. Driver
United States District Judge
Spokane 6, Washington

May 2, 1951.

Mr. M. C. Schaefer,
3535 East Burnside Street,
Portland, Oregon.

Skeel, McKelvy, Henke, Evenson & Uhlmann,
914 Insurance Building,
Seattle, Washington.

Granville Egan,
565 Olympic National Building,
Seattle 4, Washington.

Carl E. Croson,
900 Insurance Building,
Seattle 4, Washington.

In Re: Schaefer vs. Macri, et al.,
No. 2673 Civil.

Gentlemen:

The purpose of this letter is to inform the plaintiff and counsel for the defendants of my ruling on the various motions to dismiss the amended complaint, argued before me on April 16, 1951, and taken under advisement.

In granting motions to dismiss the original complaint, Judge Lemmon in his oral remarks pointed out that the statute of limitations would bar plaintiff's action unless a conspiracy was alleged in which it appeared that the last overt act was within

the statutory period. Judge Lemmon explained to the plaintiff that a conspiracy is an agreement between two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means, and that in the complaint the plaintiff had stated a bare conclusion that the defendants conspired to injure, defraud and damage him, but had not set out specifically what unlawful or improper agreement he claimed.

The plaintiff, who is acting as his own counsel, it seems to me misunderstood Judge Lemmon's statements, as he has not in the amended complaint definitely and specifically set out what unlawful agreement, confederation or preconceived plan was entered into by the defendants to injure and damage him, but on the other hand, has set out in minute detail numerous overt acts which he claims were done in furtherance of a conspiracy.

In the opening sentence of paragraph III of the amended complaint there appears the statement that the defendant "did wrongfully and maliciously conspire, combine and confederate together with wilful malicious intent to injure, damage and defraud plaintiff." On page 5 of the complaint there appears the statement that defendants, Macri, Philp and Goerig, and Continental Casualty Company through its agent and attorney in fact, defendant Philp, "were attempting from the beginning of said subcontract to bankrupt plaintiff, ruin his reputation and credit, by not paying plaintiff as per contract requirements, by not performing their part of the

work, or else performing it badly, thereby increasing cost to plaintiff and hampering and delaying plaintiff and exhausting plaintiff's operating capital."

If it is the plaintiff's position that these things, which he states on page 5, the defendants were attempting to do were the things that they agreed and as a preconceived plan conspired to do, he should definitely so state, and should then set out in the plain, concise and direct way the rules of civil procedure prescribe, the principal overt acts done in furtherance of the conspiracy including the latest ones which occurred within the statutory period of limitation.

In passing upon the motion to dismiss, I have in mind the very liberal rule which is applied in favor of the plaintiff when a motion is made to dismiss the complaint. The rule is that the complaint should be construed in the light most favorable to the plaintiff, and the motion should not be granted unless under no conceivable factual situation which might be established within the framework of the complaint could any relief be granted to the plaintiff. *Jefferson Hotel Co. vs. Jefferson Standard Life Insurance Co.*, 7 F.R.D. 722; *J. W. Terteling & Sons vs. Central Nebraska Pub. P & I Dist.*, 8 F.R.D. 210; and *Kansas Nebraska Natural Gas Company vs. City of Hastings*, 10 F.R.D. 280.

However, rule 8a of the civil rules provides that the pleadings shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief" and other parts of the rules

and the forms set out therein show that they contemplate short, plain, simple and direct statements of facts in pleadings. A complaint can so offend against these provisions of the rules as to the subject to motion to dismiss. *Picking vs. Pa. R. R. Co.*, 3 F.R.D. 425; and *Capdevielle vs. American Commercial Alcohol Corp.*, 1 F.R.D. 365. The following language from the opinion, page 425, in *Picking vs. Pa. R. R. Co.* cited above, is applicable also to the amended complaint in the present case: "The complaint * * * is complex, prolix, contradictory and replete with conclusions inextricably entangled with allegations of fact."

The amended complaint consists of upward of 92 typewritten pages. Paragraph III contains 62 separate subdivisions. It goes into minute details concerning the various transactions covered, and sets out not only evidentiary matters, but in many instances hearsay and hearsay conversations which would not even be admissible in evidence. It would impose an unfair burden upon the defendants to require them to answer such a pleading. The various motions to dismiss therefore will be granted, but the plaintiff will be given leave to file a second amended complaint within thirty days after the filing of the orders granting the motions to dismiss.

Orders may be submitted in accordance with the above. I suggest that forms of order be mailed to me at Spokane, Washington, and that copies thereof be sent to the plaintiff at his Portland address. I

shall then wait three days after receipt of the proposed orders for objection or comment from the plaintiff, and then act upon them.

/s/ SAM M. DRIVER,
United States District Judge.

[Endorsed]: Filed May 2, 1951.

In the District Court of the United States for
the Western District of Washington, Northern
Division

No. 2673

M. C. SCHAEFER, an Individual,
Plaintiff,

vs.

SAM MACRI, DON MACRI and JOE MACRI,
Individuals; W. R. McKELVY; CONTI-
NENTAL CASUALTY COMPANY, a Cor-
poration; and A. J. GOERIG and CLYDE
PHILP, Individuals,

Defendants.

ORDER OF DISMISSAL

This matter came on regularly for hearing before the above-entitled court on April 16, 1951, on motions for an order to dismiss the above-entitled action by defendants Sam Macri, Don Macri and Joe Macri, by defendant W. R. McKelvy, and by defendant, Continental Casualty Company, a cor-

poration. Defendants Macri appeared by their attorney, Granville Egan; defendant McKelvy appeared by his attorney, A. P. Curry; and defendant Continental Casualty Company appeared by its attorneys, Carl E. Croson and Willard Hatch. The plaintiff M. C. Schaefer appeared per se. The court heard the arguments for and against said motions and hereby finds that the motions to dismiss, and each of them, should be granted upon the grounds and for the reasons that plaintiff's complaint does not set forth a short and plain statement of the claim showing that the plaintiff is entitled to relief, and its averments are not simple, concise and direct, but, on the contrary, are verbose, redundant, unnecessarily detailed, and contain much evidentiary, hearsay, and immaterial matter contrary to the requirements of Rule 8 (a) and (e) of the Rules of Civil Procedure and the complaint does not conform to Rule 10 (b) of such rules which requires that all averments of a claim shall be made in numbered paragraphs, the contents of each of which shall be limited, as far as practicable, to the statement of a single set of circumstances.

It Is Now Therefore Ordered, that the above-mentioned motions to dismiss the complaint, and each of them, are granted, and the above-entitled action as to the defendants Sam Macri, Don Macri and Joe Macri, defendant W. R. McKelvy, and defendant Continental Casualty Company, a corporation, is hereby dismissed, but the plaintiff is hereby granted thirty days from the date of the filing of

this order within which to file a second amended complaint.

Dated this 16th day of May, 1951.

/s/ SAM M. DRIVER,
United States District Judge.

[Endorsed]: Filed and entered May 17, 1951.

In the District Court of the United States for
the Western District of Washington, Northern
Division

No. 2673 Civil

M. C. SCHAEFER, an Individual,
Plaintiff,

vs.

SAM MACRI, DON MACRI and JOE MACRI,
Individuals; W. R. McKELVY; CONTI-
NENTAL CASUALTY COMPANY, a Corpo-
ration; A. J. GOERIG and CLYDE PHILP,
Individuals,

Defendants.

SECOND AMENDED COMPLAINT

I.

Jurisdiction is founded on diversity of citizen-
ship and amount.

Plaintiff is a resident of the State of Oregon,
and Defendants are all residents of the State of
Washington, except the Defendant, Continental

Casualty Company, a corporation, which is doing business in the State of Washington, and the amount in controversy exceeds \$3,000.00.

II.

That between the dates March 2, 1944, and August 18, 1950, the defendant, Continental Casualty Company, a corporation, was engaged in the business of issuing bonds guaranteeing performance of contractual obligations and payment to laborers and material men supplying work or materials to general contractors; that the defendant Clyde Philp was the agent and attorney in fact in the State of Washington for said Continental Casualty Company; that said defendant Clyde Philp also was a partner with the defendant A. J. Goerig; and said Philp and Goerig were silent joint venturers with the defendants Sam Macri, Don Macri and Joe Macri; that said defendants Macri held a prime contract with the United States of America, acting by and through the Bureau of Reclamation, for certain construction work known as the Roza Irrigation Project, near Yakima, Washington; the defendant McKelvy was a practicing attorney and a member of the law firm of Skeel, McKelvy, Henke, Evanson and Uhlman, general counsel for said Continental Casualty Company; and plaintiff at all times herein complained of and for many years prior thereto was engaged in business as a general contractor and as a concrete contractor, and held a subcontract under the said Macris for the

performance of certain concrete work on said Roza Irrigation Project.

III.

That on or about the 7th day of December, 1943, the said defendants Sam Macri, Joe Macri and Don Macri, co-partners doing business as Macri and Company, signed a prime contract with the said Bureau of Reclamation for the construction of certain earthwork, pipelines, structures, laterals, and sub-laterals, under schedule I of Specification 1062, Roza Division, Yakima Project, Washington; and on the same day the defendant Continental Casualty Company issued its performance bond and its payment bond protecting the United States and, among others, this plaintiff, which said bonds were duly signed and sealed by the defendant Clyde Philp as attorney in fact for Continental Casualty Company; copy of each of said bonds is attached hereto, marked Exhibit A, and by this reference thereto made a part hereof as though set out herein in full.

IV.

That on or about the 11th day of December, 1943, the defendant Clyde Philp entered into a partnership agreement with the defendant A. J. Goerig and on the same day the said partnership of Philp and Goerig became silent joint venturers with the defendants Macri in the performance of the said contract with the Bureau of Reclamation referred to in Paragraph III hereof, and also as silent joint venturers in the performance of a number of other contracts. Said Philp and Goerig were partners

and joint venturers with said Macris on other jobs both before and after the ones herein complained of.

V.

That on or about the 14th day of March, 1944, the plaintiff signed a subcontract with the said Macris in connection with their performance of said job specification 1062, pursuant to the terms of which plaintiff was required to build forms, place reinforcing steel, pour and finish certain concrete work on said Roza Irrigation Project.

VI.

That defendants and each of them wilfully, maliciously and with deliberate intent to injure, damage and defraud the plaintiff in his performance of said subcontract and otherwise did unlawfully and in accordance with a preconceived plan confederate together, combine, conspire and agree to cause plaintiff to become financially bankrupt, to cause plaintiff to lose his said business and its assets, to ruin plaintiff's business and personal reputation and credit. In furtherance of said willful, intentional conspiracy as aforesaid, defendants engaged in a series of tortious acts continuing from the inception of work by the plaintiff under said subcontract dated March 15, 1944, to and including August 18, 1950, said acts consisting in principal part, of the following:

A. The defendants Macri in furtherance of said conspiracy willfully and intentionally failed and refused to do that portion of the work which under

the terms of the agreement between the said Macris and the plaintiff were to be done by said Macris prior to the work to be done by plaintiff, namely: willfully failing and refusing to make the excavations in a proper manner, willfully failing and refusing to do the grading in a proper manner and willfully failing and refusing to furnish the kind, quantity and quality of lumber required to be furnished by them as a condition precedent to the performance of plaintiff's portion of the work, all designed and intended to and in fact causing plaintiff considerable unnecessary delay and greatly increased cost, and further, willfully and intentionally failing and refusing to make the payments required under said subcontract; all of which acts and omissions were continuous from the inception of work by the plaintiff to the end of the job, and although it was not known to plaintiff at the time of commission thereof, said acts were the acts not only of said defendants Macri but also their silent joint venturers Philp and Goerig and the said Continental Casualty Company.

B. On or about the 15th day of July, 1944, in furtherance of said conspiracy, defendants Philp and Goerig and said Macris entered into an alleged Agreement (copy attached as Exhibit B, and by this reference thereto made a part hereof, as though set out herein in full), terminating said joint venture agreement of December 11, 1943. Said alleged termination agreement was fictitious and was executed solely to confuse the facts and deprive plain-

tiff of a cause of suit or action against Philp and Goerig.

C. That on or about the 1st day of November, 1944, the defendant McKelvy became a co-conspirator with the aforementioned defendants; on that date plaintiff employed said defendant McKelvy and the said defendant McKelvy accepted employment by plaintiff as his attorney to terminate said subcontract dated March 15, 1944, on account of the breaches by said Macris and to sue said Macris and Continental Casualty Company for the reasonable value of the work done to the date of termination, and also to terminate a second subcontract with said Macris under job specification 1068, dated April 21st, 1944, under which no work had been done by either plaintiff or said Macris as of that time.

Plaintiff at that time made full disclosure to said defendant McKelvy of plaintiff's strained financial condition, brought about by the acts and omissions of said Macris and the defaults of said Macris in not making the required payments to the plaintiff and their verbal agreement that they would so conduct their phase of the work that plaintiff would be able to complete both subcontracts by September 15, 1944; and further made disclosure to defendant McKelvy of the failure of the said Macris to live up to said oral agreement, of the defaults by said Macris in not furnishing suitable materials, in not supplying said materials timely; in not properly performing the excavating and grading; in not doing said excavations and grading timely. Plaintiff

also showed defendant McKelvy pictures of the poor grade of lumber and pictures of the improper excavations and grading, and handed to defendant McKelvy copies of memoranda prepared by plaintiff immediately following the conclusion of conferences between plaintiff and defendants Macri and their representatives on April 29th, 1944, and June 15, 1944, copies of which memoranda are attached hereto as Exhibits C and D respectively and by this reference made a part hereof as though set out herein in full. Plaintiff also advised said defendant McKelvy of statements heard by plaintiff from two different sources to the effect that the said defendants Macri were purposely attempting to bankrupt the plaintiff and force him out of business, and at that time also handed defendant McKelvy copy of letter of September 18, 1944, to the said Macris, copy to plaintiff, wherein said Bureau of Reclamation was objecting to the delay by the Macris in performing the work under said contract, copy of which letter is attached hereto as Exhibit E and by this reference made a part hereof as though set out herein in full.

Plaintiff further informed defendant McKelvy that said Macris were bonded by Continental Casualty Company with both performance and payment bonds and that plaintiff in addition to the contract on which the complaints were being made, had signed a second subcontract on April 21st, 1944, for the performance of similar work but that as of April 21, 1944, the said Macris did not then have a prime contract with the Bureau of Reclamation

and that no work had been done by either party under the second agreement; that on May 22, 1944, all but two of plaintiff's men were withdrawn from work under job specification No. 1062 because of lack of lumber and lack of excavations, and even these two men were left on the job solely to prevent Macri Co. from claiming default or abandonment by plaintiff and plaintiff was not able to return additional men to the job until June 29th, 1944, and it was not until July 31, 1944, that plaintiff was able to start pouring concrete, all because of the acts, omissions and delays by said defendants Macri, et al.

The defendant McKelvy advised plaintiff that he would accept such employment but that he did not think it would be necessary to file suit, since the Macris' attorney, a Mr. Holman, had previously been associated in McKelvy's office for a number of years, and that though Holman was then associated with another office, that Holman and McKelvy were cooperating as though they were still associated in the same office; that McKelvy would contact Holman and if the negotiations were not satisfactory would promptly file suit. At said conference on November 1, 1944, with defendant McKelvy, McKelvy's partner, Skeel, was called in by McKelvy and participated in part of the conference and expressed the opinion at the time that plaintiff probably could not hold the Macris unless he had carefully segregated costs showing what the cost would be had the work been properly performed by Macris and the extra cost occasioned by their default, and

also the opinion that plaintiff probably could not hold Continental Casualty Company liable.

Said defendant McKelvy, on or about November 8, 1944, prepared an inter-office memorandum addressed to a Mr. Kelley, associated in the firm, summarizing some of the representations made by plaintiff. On the margin of said memorandum Mr. Kelley wrote copious notes, all to the general effect that a good cause of action existed in favor of plaintiff against said defendants Macri and that the remedy consisted in cancelling the contract and suing in quantum meruit for recovery of the reasonable value of the work done, together with numerous citations of authority. Inadvertently, this original memorandum, together with the notations thereon, was handed by defendant McKelvy to plaintiff on or about October 20, 1945, at which time defendant McKelvy terminated his employment as plaintiff's attorney; copy of said memorandum is attached hereto as Exhibit F, and by this reference made a part hereof as though set out herein in full.

D. That defendant McKelvy, while professing to act for and in behalf of plaintiff, from the date of his employment on or about November 1, 1944, until said employment was terminated on or about October 20, 1945, took no action whatsoever to terminate said contract dated March 15, 1944, or the second subcontract dated April 21, 1944, or to sue for the reasonable value of the services rendered, all as per the original contract of employment. To lull plaintiff into a sense of false security, defend-

ant McKelvy sent to plaintiff a copy of a letter dated February 13, 1945, addressed to the said Macris (copy attached as Exhibit G and by this reference thereto made a part hereof as though set out herein in full); but the original was never mailed to or received by the said Macris. Said letter of February 13, 1945, was written after defendant McKelvy made a personal inspection of said Macris' work on February 9, 1945, and in reply to a letter from the Macris to plaintiff dated January 27, 1945, copy of which is attached hereto as Exhibit H, and by this reference made a part hereof as though set out herein in full. Instead, said defendant McKelvy first counseled and advised plaintiff to complete the work which plaintiff did, though under protest, completing the work on or about April 8, 1945. Thereafter when plaintiff had completed the work, defendant McKelvy then advised plaintiff that the defendants Macri were at that time judgment proof and showed plaintiff a clipping from a Seattle newspaper reporting thefts by one, Stephen Macri from Macri Company, and stated to plaintiff that the report was untrue, but that plaintiff could no longer collect from Macris as they then had their assets hidden and McKelvy then suggested that plaintiff follow certain courses of action which in plaintiff's judgment would have been fraudulent as to creditors, and for this reason the advice was rejected by plaintiff; this was about October 15, 1945. Defendant McKelvy thereafter continued to delay taking any action whatsoever against the defendants Macri and the defendant

Continental Casualty Company, as requested by plaintiff, and purposely avoided keeping an appointment on October 18, 1945, whereupon plaintiff became concerned that the statute of limitations might be running out on him; and accordingly, on or about the 20th of October, 1945, plaintiff without any appointment confronted the defendant McKelvy and inquired of him as to what the applicable limitation period was, and was then informed that plaintiff had about one month left within which to file a suit. Also, at said conference on or about October 20, 1945, defendant McKelvy then informed plaintiff for the first time that he could not represent plaintiff in any action against the defendant Macri because the Macri Company was a good customer of Continental Casualty Company, and that Continental Casualty Company was one of the largest accounts of the law firm of which defendant McKelvy was a senior partner. Although not known to plaintiff until later, Continental Casualty Company had been for years before represented by the firm of Skeel, McKelvy, Henke, Evanson and Uhlmann, and are now being so represented. Several other suits were filed in Yakima at or about the time plaintiff filed his suit in connection with which Willard Skeel of the firm of Skeel, McKelvy, Henke, Evanson and Uhlmann represented defendant Continental Casualty Company in plaintiff's case, as well as other cases against Continental Casualty Company and Macri Company, as more fully appears from transcript of proceedings of plaintiff's case, copy attached as Exhibit I and

by this reference made a part hereof as though set out herein in full.

That all of the aforesaid acts and omissions by the defendant McKelvy were done intentionally and knowingly and as part of and in furtherance of the original conspiracy by the other defendants, and were designed and intended first to cause plaintiff to become bankrupt if possible, and secondly to cause plaintiff to be disgraced and disqualified in his personal and business reputation and credit, if he followed the advice given by defendant McKelvy, and that the aforesaid acts and omissions by the defendant McKelvy were part of a deliberate attempt to lead the plaintiff on through intentional stalls and delays to the point where plaintiff would be powerless to sue the said Macris because of the running of the statute of limitations; all of which was prevented only by the diligence of plaintiff; and that all of said acts were done knowingly, willfully and intentionally in concert with the other defendants and contrary to and against the interests of plaintiff, and as part of the aforesaid conspiracy.

E. Shortly after the 20th of October, 1945, plaintiff then retained the services of an attorney in Yakima, Washington, who promptly investigated the facts and then accepted the employment which Mr. McKelvy had originally accepted, and on or about the 1st of December, 1945, made a written demand upon the defendants Macri for the payment of sums allegedly due the plaintiff for the

performance of work under the subcontract dated March 15, 1944, and gave said defendants Macri until the 15th of December, 1945, within which to meet said demand, said notice stating that in the event of said defendants' failure to do so, suit would promptly be instituted for collection thereof.

F. In furtherance of the conspiracy, said defendants and each of them caused a suit to be filed in the Circuit Court of the State of Oregon for the County of Multnomah on the 14th of December, 1945, copy of the complaint and summons wherein are attached as Exhibit J, and by this reference made a part hereof as though set out herein in full, wherein the defendants Macri alleged that they had suffered damages in the amount of \$40,000.00 by virtue of plaintiff's alleged breach of said second subcontract dated April 21, 1944, which said suit was malicious, willful abuse of legal process, was without any proper cause whatsoever, and was filed for the sole purpose of and in fact had the effect of drying up plaintiff's credit, causing him severe damage to his business in Portland and reducing him to such an impecunious financial condition as to make it virtually impossible to continue the prosecution of the threatened suit in Yakima, Washington, and the filing of the suit in Oregon was possible only because of the omission of defendant McKelvy to terminate said second contract as heretofore alleged.

G. That despite the filing of said malicious and totally unfounded suit in Multnomah County, Ore-

gon, plaintiff did file a suit in the Federal District Court in Yakima, Washington, under the Miller Act pursuant to letter dated August 10, 1945, from said Bureau of Reclamation, copy of which is hereto attached as Exhibit K, and by this reference made a part hereof as though set out herein in full; which suit was filed on or about the 20th day of December, 1945; and thereafter the defendant Continental Casualty Company then brought to plaintiff's attention for the first time (by contacting plaintiff's attorney Olson, see copy of letter attached as Exhibit L, which by this reference thereto is made a part hereof as though set out herein in full) the fact that the defendants Philp and Goerig were silent joint venturers with the defendants Macri and asked that the complaint be amended so as to name said defendants Philp and Goerig as additional parties defendant, which plaintiff did. Said Continental Casualty Company knew at all times the silent arrangements between the Macris and Philp and Goerig and the purported termination of some of the agreements (see Exhibits L and B). Said suit in the Federal District Court in Yakima was tried on the merits and finally resulted in a judgment in favor of plaintiff and against the defendants Macri, Philp and Goerig, and Continental Casualty Company, for what the trial court thought was the reasonable value of the services rendered by plaintiff under the contract dated March 15, 1944, and as part of the decision in that suit the subject matter of the aforesaid suit filed in Multnomah County, Oregon, on December

14, 1946, (which after much inconvenience plaintiff succeeded in having dismissed and which later became the subject of a cross-complaint and counterclaim by defendants against plaintiff in said suit filed in Yakima, Washington), resulted in a judgment in favor of plaintiff, and plaintiff was awarded nominal damages. Copy of the memorandum opinion of the trial judge and the judgment in said suit in Yakima are attached hereto as Exhibits M and N, and by this reference made a part hereof as though set out herein in full.

H. Said conspiracy was thereafter furthered by Defendants Philp and Goerig, the Macris and Continental Casualty Company in the following particulars, to wit:

1. Continental Casualty Company led the way in the appeals of the trial court judgment and protected Defendants Macri from being precluded from appealing. On or about May 9, 1947, Continental Casualty Company filed its motion for new trial (copy of motion attached hereto as Exhibit O, and by this reference made a part hereof as though set out herein in full), which was overruled by Order of May 20, 1947, (copy attached as Exhibit P and by this reference made a part hereof as though set out in full). On May 20, 1947, Continental Casualty Company filed its notice of appeal and on July 29, 1947, Goerig and Philp filed their notice of appeal. Not until August 18, 1947, did said Macris file their notice of appeal, which date was beyond the time allowed to appeal and was attacked

by plaintiff's motion to dismiss, but the motion was denied on grounds that other defendants had filed timely, hence the Macris' could come in. (Copy of Motion to Dismiss and Order of Appellate Court denying the motion attached hereto as Exhibit Q, and by this reference hereto made a part hereof as though set out herein in full.) On February 11, 1949, the Circuit Court of Appeals affirmed the trial court judgment and again Continental Casualty Company led the way on March 7, 1949, with a petition for rehearing. On March 10, 1949, the Macris filed similar petition. Transcript of proceedings in the Appellate Court is attached hereto as Exhibit R and by this reference made a part hereof as though set out herein in full. On April 5, 1949, the said Appellate Court by order (copy attached as Exhibit S and by this reference made a part hereof as though set out herein in full), denied the said petitions for rehearing and on the same day order staying issuance of mandate (copy of which is attached hereto as Exhibit T and by this reference made a part hereof as though set out herein in full), was entered as to Continental Casualty Company pending filing and determination of petition for writ of certiorari to be made by Continental Casualty Company. On May 14, 1949, Continental Casualty Company filed its petition for writ of certiorari and on June 20, 1949, the court announced that their writ was denied. On the same day, June 20, 1949, the Macris filed their petition for writ of certiorari, which was denied on October 10, 1949. On the same day,

October 10, 1949, Continental Casualty Company's petition for rehearing on the order denying their petition for writ of certiorari was denied.

All of said acts of separately appealing and delaying were done in furtherance of said conspiracy and were intended to bankrupt plaintiff and preclude his continuing prosecution of the case; and defendants nearly succeeded.

I. Finally, on or about the 9th of November, 1949, the draft issued by Continental Casualty Company in payment of the trial court judgment was delivered to plaintiff, but even then and in furtherance of the aforesaid conspiracy, language was intentionally included on the reverse of the draft immediately prior to the space for endorsement, intended to have the effect of preventing plaintiff from filing this suit and only after protracted negotiations and discussions did the bonding company finally consent to the deletion of the language objected to by the plaintiff. Neither Philp nor Goerig nor the Macris have yet paid to Continental Casualty Company the judgments obtained by Continental Casualty Company against them in plaintiff's suit in Yakima, Washington.

J. On or about the 16th day of August, 1950, Defendant McKelvy approached plaintiff at his office in Portland, attempting to collect the billing previously rendered for services purportedly rendered by Defendant McKelvy for plaintiff in the period from November 1, 1944, to October 20, 1945, again as part of the purpose to preclude plaintiff

from filing this lawsuit, said conference being brought on as a result of letter from plaintiff's attorney, Olson, to Macris' attorney (copy attached as Exhibit U, and by this reference hereto made a part hereof as though set out herein in full) advising in part, that Continental Casualty Company's appeal bond covered damages from delays on appeal and that plaintiff claimed substantial damages from these causes and contemplated filing suit for such damages. All of said conversation, conducted in the presence of two of plaintiff's employees, was immediately reduced to the form of a memorandum by plaintiff, copy of which is hereto attached as Exhibit V, and by this reference thereto made a part hereof as though set out herein in full. The letters and phone calls Defendant McKelvy represented to plaintiff that he made to plaintiff's attorney, Olson, were flatly denied by said Olson at a conference in his office with plaintiff on August 18, 1950, and Olson also at that time permitted plaintiff to examine his files and plaintiff found none of the letters or notes of conversation or alleged calls by Defendant McKelvy.

K. On October 4, 1950, plaintiff called said Olson to arrange a meeting to review rough draft of complaint in this damage action, but at that time Olson declined to represent plaintiff for the sole reason that McKelvy was to be made a party defendant.

VII.

That by reason of the premises aforesaid and all of the acts and omissions of defendants and each

of them in furtherance of their aforesaid preconceived and concerted plan and conspiracy and as the direct and proximate result thereof, plaintiff for several years thereafter had no personal credit whatsoever with which to conduct his business in Portland, and was able to survive in business at all only by one or more of his employees' employing their personal credit, which was nominal in amount, with which to obtain the materials and conduct his business; that plaintiff suffered severe financial losses as a result of the consequent great curtailment of his said business activities. Plaintiff also suffered severe damage to his reputation, and suffered severe mental anguish. Plaintiff also by reason of the aforesaid conspiracy and acts of defendants in furtherance thereof was prevented from perfecting, developing and marketing certain inventions relating to improvements in tools and methods used in the concrete and construction business, all of which would otherwise have been perfected and marketed at a substantial profit to plaintiff, all to plaintiff's damage in the sum of One Million (\$1,000,000.00) Dollars.

Wherefore, plaintiff prays that he have judgment against defendants, and each of them in the sum of One Million (\$1,000,000.00) Dollars.

/s/ M. C. SCHAEFER,
Plaintiff.

EXHIBIT A

Performance Bond

(Construction or Supply)

Know All Men by These Presents, That we, Sam Macri, Don Macri and Joe Macri, partners composing a firm, Macri Company, of Seattle, Washington, as Principal, and Continental Casualty Company, a corporation, organized and existing under the laws of the State of Indiana, as Surety, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of sixty-five thousand and 00/100 (\$65,000.00) dollars for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation Is Such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated December 7, 1943, for construction of earthwork, pipe lines, and structures, laterals 59.3 to 69.8 and sublaterals, under Schedule No. 1 of Specifications No. 1062, Roza Division, Yakima Project, Washington.

Now, Therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the

surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals this 7th day of December, 1943, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its under-signed representative pursuant to authority of its governing body.

[Seal] /s/ SAM MACRI,
 905 Tenth Ave. So.,
 Seattle 4, Wash.

In the presence of

Niels H. Hjorth,
3739 Burns St., Seattle, Wn.

/s/ DON MACRI,
 905 Tenth Ave. So.,
 Seattle 4, Wash.

In the presence of

Niels H. Hjorth,
3739 Burns St., Seattle, Wn.

/s/ JOE MACRI,
905 Tenth Ave. So.,
Seattle 4, Wash.

In the presence of

Niels H. Hjorth,
3739 Burns St., Seattle, Wn.

[Seal] CONTINENTAL CASUALTY
COMPANY,
(Corporate Surety)
Box 534, Yakima,
Washington.

By /s/ CLYDE E. PHILP,
Attorney in Fact.

Attest:

ELLA HOLT.

Payment Bond

(Construction)

Pursuant to the Act of Congress,
Approved Aug. 24, 1935
49 Stat. 1011

Know All Men by These Presents, That we, Sam Macri, Don Macri, and Joe Macri, partners composing a firm, Macri Company, of Seattle, Washington, as Principal, and Continental Casualty Company, a corporation, organized and existing under the laws of the State of Indiana, as Surety, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of sixty-four thousand two hundred seventy-five and 48/100 (\$64,275.48) dollars for the pay-

ment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation Is Such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated December 7, 1943, for construction of earthwork, pipe lines, and structures, laterals 59.3 to 69.8 and sublaterals, under Schedule No. 1 of Specifications No. 1062, Roza Division, Yakima Project, Washington.

Now, Therefore, If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals this 7th day of December, 1943, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

[Seal] /s/ SAM MACRI,
905 Tenth Ave. So.,
Seattle 4, Wash.

In the presence of

Niels H. Hjorth,
3739 Burns St., Seattle, Wn.

[Seal] /s/ DON MACRI,
 905 Tenth Ave. So.,
 Seattle 4, Wash.

In the presence of

 Niels H. Hjorth,
 3739 Burns St., Seattle, Wn.

[Seal] /s/ JOE MACRI,
 905 Tenth Ave. So.,
 Seattle 4, Wash.

In the presence of

 Niels H. Hjorth,
 3739 Burns St., Seattle, Wn.

[Seal] CONTINENTAL CASUALTY
 COMPANY,
 (Corporate Surety)
 Box 534, Yakima,
 Washington.

[Seal] By /s/ CLYDE E. PHILP,
 Title: Attorney in Fact.

Attest:

 ELLA HOLT.

The rate of premium on this bond is xxxxx per thousand.

Total amount of premium charged, \$ premium included in performance bond.

EXHIBIT B

By Virtue of This Agreement, made and entered into on July 15, 1944, by and between Macri & Company, a co-partnership, herein referred to as First Party, and A. J. Goerig and Clyde Philp, individually and constituting a co-partnership as Goerig and Philp or A. J. Goerig Construction Co., herein referred to as Second Parties,

Witnesseth:

The parties hereto heretofore and on or about December 11, 1943, entered into each of the several joint venture agreements in relation to the following operations:

1. A corporation as formed under the name and style of Macri Development Company, for the purpose and intention of developing Real Estate and building, 194 Federal Housing Administration dwelling units, as per plans and specifications, between 135th Street South and 140th Street South, near the Pacific Highway south of Seattle in King County, Washington.

2. Contract No. 2912, construction on Secondary State Highway No. 1-S, Johnson & Jim Creek Bridges, Cowlitz County, Washington.

3. Contract No. 12r-14825, Spec. 1062, earthwork, pipelines and structures, Laterals 69.3 to 69.8 and sub-laterals and Diversion Channels, Roza Division, Yakima Project, Washington.

4. Earthwork, pipelines and structures, Laterals

70.1 to 80.1 and sublateral, East Turbine Laterals Sta. 260-00 to end and sub-laterals East Turbine Lateral Wasteway and Diversion Channels, Mile 51.74 to Mile 58.45, Roza Division, Yakima Project, Washington.

5. The work to be done on Project 9536, Contract W7412-eng-1, duPongRPG-4344 being constructed at Richland, Washington, being known as the Sewer and Watermain Facilities Richland, Subcontract No. 4, Richland, Washington, as it now exists.

That the parties hereto are desirous of terminating, cancelling and nullifying each of said joint venture agreements in relation to each of said operations, and now in consideration of the mutual engagements on the part of each of the parties hereto herein contained, and in further consideration of the mutual engagements on the part of each of the parties hereto herein contained, and in further consideration of the sum of Ten Dollars (\$10.00) in hand paid by each of the parties hereto, one unto the other, it is now agreed that each of said joint venture agreements between the parties hereto in relation to each of said projects above described, 1, 2, 3, 4, and 5, are hereby and now mutually cancelled, terminated and ended as though they had never been entered into, saving unto the parties, however, the duties, obligations, liabilities and responsibilities as hereinafter set forth.

1. It is understood that in reference to the first four contracts or projects referred to hereinbefore,

the contracts with the owners were entered into by first party and that second parties did not appear therein excepting as to the first project, this was a corporation formulated to carry on a building operation and second parties have advanced certain money in connection with said enterprise, credit for which second parties shall receive. Each of the said first four projects first party shall complete and perform as expeditiously as possible and as required by their contract obligations, and in event first party sustains financial loss in respect to the performance of any of said projects or contracts, then when said loss is ascertained and determined, second parties will pay to first party on each of said projects upon which a loss may result $52\frac{1}{3}\%$ thereof. In determining the amount, if any, which second parties shall pay to first party, each of said projects shall be treated separately and profit, if any, realized by first party on one or some of said projects shall not be taken into consideration as to any loss that may be sustained upon any of the others. In this respect, in order to ascertain profit and loss, each transaction shall be considered entirely separate.

2. As to Project 5, this contract with the owner was entered into by second parties directly with the owner, and first party does not appear therein, and second parties shall proceed with the performance of the same as though no joint venture agreement had ever been entered into in respect thereto, and second parties shall be entitled to receive all profits that may come, arise or grow in connection there-

with, and shall themselves bear and pay any and all losses that may occur and shall save first party harmless from any legal liability or responsibility whatsoever in connection with the completion and performance of the same. (39)

3. Second parties shall pay to first party, as soon as the amount is ascertained, the equipment rentals for the first party's two-hoe shovels on the basis of the rental agreement regarding the same heretofore used, and now being used by second parties upon Project 5, as aforesaid, and will likewise pay for the repairs that are required upon first party's Lorraine Shovel use, as being used by second parties on said Project 5.

4. In determining whether any loss on any of said projects results to first party, it is agreed that no rental on any of first party's equipment furnished and used on any of the same shall be charged, and it is further agreed that second parties are to charge no equipment rental against first party on Project 1, known and designated as "Val Vue Real Estate Development."

5. It is understood that in the settlement and adjustment now being made between the parties in respect to said joint ventures, second parties will transfer to first parties all of the corporate stock in Macri Development Company, a corporation, that has or in reference to which it may become necessary to issue to second parties or either of them, and that second parties shall receive a credit therefor from first parties of \$37,500.00. That sec-

ond parties upon Project 5 are to receive or be credited with, as between the parties, the sum of \$56,604.00, and the difference between said sums of \$37,500.00 and \$56,604.00, or the sum of \$19,104.00 is now acknowledged as having been paid by second parties to first party concurrently with the execution and delivery of these presents.

6. It is further agreed and understood that there are other joint ventures between the parties hereto that are not mentioned herein, some of which have been completed, but in connection with which final payments have not been received by the owners, some of which are in the process of construction looking toward completion. That in respect to none of these shall the relationship of the parties in any respect be changed by this agreement, and that their relationship as joint venturers is only concluded in respect to those hereinbefore specifically described and mentioned and that their relationship in respect only to those are hereby terminated and ended and as herein specified. (40)

7. It is further agreed that certain funds of a joint venture between the parties hereto, commonly referred to as Stadium Homes, a housing project being constructed in Seattle, Washington, have been diverted to some or all of the first four projects or operations as hereinbefore described. First parties now agree to forthwith and immediately cause said diverted funds to be returned to the bank account of the Stadium Homes joint venture, in which all of the parties hereto are jointly interested, and not

allow any subsequent diversion or diversions of the funds of that joint venture in aid or in assistance of any of first party's subsequent operations, without second parties' written consent.

8. It is further understood and agreed that this arrangement as hereinbefore specified between the parties is done and accomplished in a spirit of cooperation and friendship between all the parties hereto, and that either of the parties hereto will, if called upon by the other parties, give and render every possible assistance, one unto the other, in the completion of any or all of said projects. If the rendition of such cooperation and assistance by one party unto the other in this respect involves financial expenditures subsequent hereto, reimbursement by one party unto the other shall be determined and settled when the assistance is sought or obtained.

9. In connection with the completion of the organization of Macri Development Company, a corporation, and the preparation of its books, records, and the issuance of its corporate stock, and particularly by Clyde Philp, one of the second parties, who has been elected secretary of said corporation and has performed duties in that capacity, each of second parties shall sign any and all additional papers or documents as and when their signatures are required, in order to expedite and complete all of the business affairs of said corporation and enable it to arrange its books of account, corporate records, and financial set-up along the lines as originally agreed upon between the parties. It is understood, however, that Clyde Philp, con-

currently with the execution of these presents, is resigning as secretary of said corporation, but agrees to continue to act as such until the acceptance of his resignation by the Board of Directors of said corporation has been accomplished.

In Witness Whereof the parties hereto have caused these presents to be executed and delivered the day and date first above written.

MACRI & COMPANY,

By DON MACRI,

One of Said Firm, But Authorized to Act in This Matter for It, First Party.

CLYDE PHILP,

A. J. GOERIG,

Individually and d/b/a Goerig & Philp and/or A. J. Goerig Construction Co., Second Parties.

[Endorsed]: Filed July 5, 1946. (42)

EXHIBIT C

We, Wm. E. Schaefer and M. C. Schaefer, had an appointment with Sam Macri for 10:00 a.m., 4-28-44, at the job office. Macri did not show up. George Staples, Superintendent for Macri & Company, came in from the field in the afternoon. M. C. Schaefer asked him to locate Macri. Staples called Seattle but did not reach Macri and the Seattle office did not know where he was. Staples then said, "I believe Macri is going to quit interfering with

my program, forcing me to lay off men, saying you've got too many men, the pay roll is too big, lay them off, and if he doesn't, I don't think I'll be here long, and I'm going to put on sufficient help and see that the excavating will be done according to specification."

M. C. Schaefer said, "That's not enough. You get hold of Macri and see that he shows up tomorrow before noon or we'll start gathering our equipment and pull off the job starting at noon."

Staples said, "Don't do that, Matt. In the future I'll see that you don't have to wait for anything. I'll get in touch with him." He then called Yakima and talked to Macri.

The next day Macri, W. E. Schaefer and M. C. Schaefer met at the office and drove to the field. We stopped at Structure #18. Fred Waltie (our superintendent) and George Shular, a form setter, were excavating. M. C. Schaefer had them stop excavating. Waltie then sent Shular to the yard to work. Waltie then came with us to check the excavations. We checked approximately 6 or 7 holes and they were all off.

Macri said, "Well, we are just getting started. You've got to expect some of this at the start, and you are supposed to do some grading .2 or .3."

M. C. Schaefer said, "Oh, no, we don't have a thing to do with it, but you are trying to shove it onto us, and that's what we're here about."

Macri said, "All right, we'll get the excavating right from now on." Turning to Staples he said, "You get the men in here and get this grading

done.” Then looking at M. C. Schaefer said, “Or you go ahead with it and I’ll pay you for it.”

M. C. Schaefer said, “Now just a minute. You know better than that. You get your men in here and see that these holes are excavated per plan and specifications, and that means out 1 foot and on a 1:1 slope, and have sufficient men and equipment here to do it. You told us you would have plenty of equipment and men on the job so that we could go as fast as we wanted to, and here we are killing time laying out for fine grades, excavating, grading, cribbing, backfilling, rebuilding dried-out forms, etc., and not only that but: What are we going to do next week? You get down to business and excavate these holes to the specifications.”

Macri said, “You take the excavating item, then you handle it.”

M. C. Schaefer said, “No, but if we were doing it, we’d watch our cut banks and elevations and not only excavate out a foot and on the 1:1 slope, but would pull out a couple extra shovelfuls here and there so the finegraders in trimming the cut banks and fine grading could semi-shove the excavating material into these extra pockets instead of shoveling up on a bank and having the carpenters kick it back into the hole. I’ll say the total excavating cost for structures would be less if the excavating were done per specifications than the hand work alone is costing now.”

Macri said, “We haven’t got the men. This little grading don’t amount to anything. Keep track of it, and I’ll pay you for it.”

M. C. Schaefer said, "That's not all you are going to pay for. You're going to pay for all the extras. What do you think we are? Who do you think is going to pay the extra cost of placing these forms, of stripping them out of such holes as this, wrecking them, and having to haul all the forms back to the yard for repair instead of to structures ahead. We're going no further. If your performance doesn't change, we'll just pull out."

Macri said, "All right, quit arguing. We'll get more men in here, and I'll get another shovel on the job, and we'll get excavations right, and we'll keep out of your way. I'll pay you all extras then, so keep going." He then turned to Staples and said, "Get men in here and get this work fixed up." Staples then left to lay out holes for the shovel.

Back at the office later, M. C. Schaefer said to Staples, "Now what will these promises amount to."

Then Staples said, "Now that's it. Macri passes it onto me. Out in the field he said, 'We will get things on the button,' then he told me later, 'Keep going as you are. Let them excavate .2 or .3,' and Matt, I'm getting tired of it. I knew yesterday where to reach him, but he said for me not to call him unless I had to. Well, when you said you were going to pull out, I had to get in touch with him. I don't know what to think. Macri is paying my salary, but this buck passing isn't a part of our deal. On the other hand, stick with it. I'll get more men on and get things working as they should or Macri will have to lay me off. I'll not quit. I'll work it out, or he'll have to lay me off."

EXHIBIT D

We, Allyn R. Hunter, Fred Waltie, and M. C. Schaefer, had an appointment with Sam Macri 6-15-1944 at the job office.

We then drove to the field to check the excavations, the conditions of the set forms, etc. Present were Sam Macri, Mr. Cohn, Macris' Engineer; Allyn R. Hunter, Rogers Insurance Agency, Fred Waltie, our Superintendent, and M. C. Schaefer.

M. C. Schaefer pointed out the different errors in the excavating work, the condition of the set forms, etc.

Macri said, "That's nothing to holler about. We just got started here. The rest are better, and we'll get them o.k. from now on."

M. C. Schaefer said, "You point out any that are better." So we went on to check more holes, none were better, but some were worse. M. C. Schaefer pointed out where we had set the outside forms so that Macri's crew would know where to crib and backfill and where they had so backfilled.

M. C. Schaefer said, "This is backfilled, and the backfill is not puddled, who is to take the responsibility of cracked structures due to such backfilling?"

To which Macri replied, "That's not for you to say. That's up to the inspector."

M. C. Schaefer said, "Yes, but I sure expect to hear about it if the structure cracks. That's a minor detail. The real thing is, when are you going to get these excavations to specification, and I mean excavated out 1 foot and on the 1:1 slope.

The way these holes are excavated the slow progress and absolute lack of cooperation on the part of Sam Macri & Company is making our work cost, if continued in the same way, in excess of twice our bid price. Now just when are you going to get men in here and get going? We are tied up now without anything to do on account of there being no holes ready and no material, and we are paying a couple of men so as not to lose them."

Macri said, "Well, you take the excavating item."

M. C. Schaefer said, "No, but as I told you before, if we were doing it, we would watch our cut banks and elevations and excavate per specification, which is out 1 foot and on a 1:1 slope. Plus that, we'd excavate a bit more, if anything, so as to give room for the hand excavators to semi-shove the small amount of hand excavated material then required to be excavated to a side instead of shoveling up on a bank for the carpenters to kick back into the hole again and for the strippers to dig out before they will be able to get the forms out. And I'll say it again, I believe the total excavating then would cost less than the hand excavating alone is costing now."

Macri said, "You are supposed to do a little grading .2 or .3."

M. C. Schaefer said, "Here we go again, the same old argument, the same old promises over and over again. We don't have a thing to do with it! You better get all that equipment you've been promising for so long in here and the necessary men. I've asked that you have clear sailing ahead for us so we can

pour at least 20 cubic yards of concrete per day, and I mean every day, and that means at least 80 structure excavations ahead of our pouring crew."

Macri said, "All right, we'll get the excavating right from now on. We'll have an engineer on the job Monday, and we'll get necessary material on the job. So get back and go to work."

M. C. Schaefer said, "Not yet we won't. You get plenty of holes ahead first. Your Superintendent in his letter to us before we figured the job said you would be ready for concrete in about two weeks, and here we are tied up like this."

Macri said, "Yes, you told me Staples was a good man, and he can't handle it."

M. C. Schaefer said, "I've never said anything of the kind, but if he had had a little cooperation from you, he probably would have done better by far."

Macri said, "I'll have an engineer on the job Monday, so quit arguing. We'll get going."

M. C. Schaefer said, "When will you get these holes cleaned up and re-excavated per specification? If not soon, you will be doing the forming and concrete work yourself. This expensive operating is at an end right now. You're going to have a big extra bill so far."

Macri said, "I told you I will pay for the extra excavating."

M. C. Schaefer said, "Extra excavating—you're paying for all the extras."

Macri said, "All right. I'll pay all extras. Nobody will lose money on my job. I told you that

fied pipe layer. You are requested to immediately resume pipe laying operations with a sufficient force of qualified pipelayers so as to insure completion of this work during favorable weather conditions.

“We cannot accept labor conditions as a prime cause of these delays for the reason that all of our other contracts now in force are ahead of schedule. We have been advised that a considerable part of these delays are due to protracted negotiations with prospective sub-contractors rather than to an aggressive prosecution of the work.

“Very truly yours,

“H. T. NELSON,

“Construction Engineer.”

EXHIBIT F

The following is a photostatic copy of an office memo, consisting of four pages, from Mr. McKelvy to Mr. Kelly of their office.

November 8, 1944.

Mr. Kelley:

Re: Concrete Construction Co. -
M. C. Schaefer, Subcontractor,
Roza Project, Yakima.- Macri & Co., Contractors.

Attached are Subcontracts and Contracts Nos. 1 and 2. Mr. Schaefer subcontracted the concrete work on the Roza Division, Yakima Project. No work has as yet been started on Contract No. 2. Contract No. 1 is about one-third completed. The contract terminates on February 8, 1945.

The nature of work being performed is pouring the concrete in building diversion channels and other structures in connection with this Reclamation Project. Macri & Company, general contractors, does the work ahead of the concrete work, so that the speed of the subcontractor is governed by the general contractor.

Schaefer, representing Concrete Construction Company, claims that it is impossible for him to continue with the work; that he has already lost a lot of money; that it will be impossible to complete the work by February 8, due to the fact that the concrete work cannot be done in cold weather, and claims that the reason he has lost money on the job is that Macri & Company has breached its agreement in the following respects:

1. The excavating is being done in a haphazard manner and not according to specifications, making it necessary for Schaefer to excavate before doing his part of the work, at considerable expense; *perhaps this would constitute performance being prevented by acts of adverse party*
2. Macri furnishes very poor lumber, -apparently lumber used on other contracting jobs;
3. Macri has failed to put enough *see above - same reason* equipment on the job to keep excavation ahead of Schaefer, with an ordinary crew;
4. Schaefer has not been paid until very late; has still not received his pay for September. (See Article 2 of Subcontract in this connection.); *Good Grounds -*
5. Macri has failed to construct roads so that Schaefer can get equipment around. Schaefer is bonded on Contract No. 1 but is not bonded on Contract 2, which has not yet been commenced. *bonded to Macri - probably - notice should be sent owner?*

The evidence which Schaefer has concerning Macri's acts is not specific and satisfactory; nevertheless Schaefer insists that he must collect or go broke. He has had a number of meetings with Macri and the Project Engineer, but nothing has been accomplished.

Cancel & ask quantum meruit recovery? (and loss sustained by others.)

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-2-

In effect, Schaefer now wants to know how he can throw up these contracts and best protect himself?

Probably Schaefer should notify Macri & Company that he is not going to proceed with the work, outlining various reasons. Also, we should consider the advisability of bringing suit on Contract No. 1 for past and future damages.

Mr. Skeel should call Mat Schaefer, Portland (Lander 4181) and give him our tentative ideas at least on what we think he should do.

McK.

D.

6

waves of 1962

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Re Arbitration Rule
~~see~~ Morison et al safe Co
 case
 81 W 592

06 W 254 + Bishop v Ryan Construction Co.
 Refusal to make a monthly payment
 re for hauling on county road work, to
 determine the amount due, constitutes
breach of the contract, warranting a
rescission.

Failure to immediately cancel a
 contract upon non-payment was not
waiver of the right - party could so
 use at any time up to time other
 party offered to make such payment.

130 W 348 Francis v Hoard
 Party guilty of first breach of contract
 may be deprived of benefits therefrom, such as profits

71 Pac (2) 30 (wash) Russell v Stephens
 our Supreme Ct differentiates between
 "secession" and "termination by breach"
 "Breach" allows action for damages against
 defaulting party. 5 Page on Contracts # 2878, 3073
 # 3024, # 3027
 also 3 Wellston # 1301-1303, pp 2351-55

1. Call attention to breach

2.

My reason ^{these} of not ~~as~~ ^{we} ~~claim~~ ^{are} ~~entitled~~ ^{entitled} to ~~termin~~ ^{termin} & require to ~~pay~~ ^{pay} & ~~recomp~~ ^{recomp} ~~as~~ ^{as} ~~costs~~ ^{costs} & ~~profits~~ ^{profits}

3. Full of men &

4. ~~trades~~ ^{trades} for arbitration -

~~As~~ ^{As} ~~much~~ ^{much} ~~we~~ ^{we} ~~entitled~~ ^{entitled} ~~to~~ ^{to} & ~~after~~ ^{after} ~~cost~~ ^{cost} & ~~unless~~ ^{unless} ~~if~~ ^{if} ~~they~~ ^{they} ~~have~~ ^{have} ~~been~~ ^{been} ~~in~~ ⁱⁿ ~~a~~ ^a ~~difficult~~ ^{difficult}

if necessary

EXHIBIT G

February 13, 1945.

Macri Construction Company,
905 10th Ave. So.,
Seattle 4, Washington.

Attention: Mr. Sam Macri

Dear Mr. Macri:

Mr. Matt Schaefer of the Concrete Construction Company has furnished me with an itemized breakdown of his costs already incurred in connection with Contract No. 12r-14825, Specification No. 1062, United States Reclamation Job, Roza Division, Yakima Project, Washington, which cost figures I am herewith transmitting to you. You will note that these are itemized by the month, each page representing a separate month, from March, 1944, to January, 1945, inclusive, together with a recap sheet.

Mr. Schaefer also advised me the other day that he had not yet received a check for his December work from you. Possibly this has already been forwarded to him by this time.

With reference to your letter of January 27, 1945, addressed to the Concrete Construction Company on the above matter, wherein you advise the Concrete Construction Company that you will charge any penalty assessed by the United States against you to such company, please be informed that our investigation discloses that you have not completed your own work as required under your contract with

the United States Bureau of Reclamation in regard to the above project. This work of yours which has not been completed as of this date by you has prevented and is preventing the Concrete Construction Company from finishing up its subcontracting work. Under these circumstances the Concrete Construction Company will therefore refuse to accept your attempt to charge a penalty to that company, which penalty, if any be assessed, would be due to your own failure to comply with the original contract and the subcontract.

In connection with the second subcontract No. 1068, Roza Division, Washington, United States Reclamation Job Specification No. 1068, to which you refer in your letter of January 3, 1945, it appears that you have likewise failed to comply with the provisions of said subcontract.

An investigation of the excavations made by you with reference to such second subcontract, such investigation being made on February 10, 1945, discloses that all of such excavations have been made in a manner contrary to the specifications of such contract and subcontract. Such specifications provide substantially that an allowance of one foot outside of the outside wall is to be made entirely around the structure, including head walls, and back slopes of 1:1 are to be allowed all the way around from one foot outside of the structure to the ground surface.

This has not been done in any of the excavation

work in connection with such subcontract No. 1068 and the excavation has been made sheer on virtually every wall, with little or no allowance, making it impossible to construct forms therein and to do the necessary work preparatory to pouring concrete. This is the same type of defective work that you did in connection with all of the excavation on Contract No. 1062 and the subcontract in connection therewith, which made it impossible for the Concrete Construction Company to proceed with Contract No. 1068 and the subcontract therewith.

At this time, therefore, by reason of such faulty excavation in connection with your work on Contract No. 1068 and the subcontract therewith, Concrete Construction Company hereby declares that you have breached the provisions of said subcontract No. 1068 and said Concrete Construction Company therefore holds you in default and declares the forfeiture of such subcontract by reason of your breach thereof.

Yours very truly,

W. R. McKELVY.

WRM:MW

Encl.

EXHIBIT H

January 27, 1945

Concrete Construction Co.

Re: Subcontract No. 1062, Roza Division,
Washington; U. S. Reclamation Job
Specification No. 1062

Gentlemen:

This is to advise you that under the terms of our principal contract all work is to be performed and completed within four hundred days after December 29, 1943. You are therefore advised that any failure to complete your subcontracted work will result in a charge to you of any penalty for delay that may be asserted against us by the United States on account thereof.

A copy of this communication has been mailed to your surety, Glen Falls Indemnity Company, care of Mr. R. F. Owen, Spalding Building, Portland, Oregon.

Very truly yours,

MACRI & COMPANY,

By SAM MACRI.

SM/WW

Registered—Return rec. requested.

EXHIBIT I

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 246

THE UNITED STATES OF AMERICA for the
Use of M. C. SCHAEFER, an Individual
Doing Business as CONCRETE CONSTRUCTION COMPANY,

Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J.
GOERIG and CLYDE PHILP, Individuals
and Co-partners Doing Business as MACRI
COMPANY, and CONTINENTAL CASUALTY COMPANY, a Corporation,

Defendants.

RECORD OF PROCEEDINGS AT THE TRIAL

Be it remembered, that on the 21st day of February, 1947, the above-entitled cause came regularly on for trial in the above Court at Yakima, Washington, before the Honorable Sam M. Driver, Judge of said Court, sitting without a jury; the Plaintiff not appearing; the Defendants Sam, Don and Joe Macri appearing by Tom W. Holman, of Brethorst, Holman, Fowler, and Dewar, of Seattle, Washington; the Defendants, A. J. Goerig and Clyde Philp, appearing by Kenneth C. Hawkins, of Brown and Hawkins, of Yakima, Washington; the Defendant,

Continental Casualty Company, a corporation, appearing by Willard E. Skeel, of Skeel, McKelvy, Henke, Evenson & Uhlmann, of Seattle, Washington, and the following proceedings were had: (2485)

* * *

The Court: This same question is involved in all of the cases here against the Macris and the Continental Casualty Company, but I wonder if we shouldn't proceed on the record here in one of the cases, and then stipulate, if counsel is willing to do that, that it may apply in all of the cases?

Mr. Holman: Yes, your Honor.

The Court: Is there any particular preference, then, as to the case we should select for the record at this time?

Mr. Holman: I think not.

Mr. Hawkins: 257, I think that's the one that has the letters involved in it.

Mr. Holman: Well, in the event counsel feels that way, let's take 255.

Mr. Hawkins: Case 257 has these letters in evidence, as to which we've made a special point, and will continue to make a special point.

The Court: Yes, I think that is true. Let's take 257; it has that question that isn't involved in the others.

* * *

Mr. Holman: Call Mr. Goerig to the stand. I am calling him under the rule, your Honor, as an adverse witness. (2486)

A. J. GOERIG

one of the defendants, called as an adverse witness on behalf of the defendant Macri, being first duly sworn, testified as follows:

Direct Examination

By Mr. Holman:

Q. Mr. Goerig, you are the Goerig mentioned in the papers which have been read to the Court here? A. Yes.

Q. I'll ask you whether or not you received a copy of Macri's Exhibit for identification 3, this statement of account that I had a moment ago?

A. I can't say that I did, no. I was never active in the office work. I was on the outside normally.

Q. And who was active in the office work?

A. Mr. Philp.

Q. Mr. Philp handled the office work and you handled the outside?

A. Mr. Philp handled the office details and I handled the outside.

Q. And had you ever seen that before today?

A. I can't say whether I did or not. I've seen lots of reports and financial statements, but I wouldn't swear to that.

Q. When did you know that Sam Macri had made an assignment to the bank of his rights under these joint venture agreements to secure his loan at the bank? The one I'm saying (2487) is the same bank all the time, your Honor, Seattle First National Bank.

(Testimony of A. J. Goerig.)

A. Oh, it was—I couldn't say; it was over a year ago I think. I never saw the assignment, but they were always bringing it up in conversation when I was in the bank.

Q. That is, the bank was?

A. The bank was, and they kept—well, they kept asking about it. If I may go on, I can describe how I know about the assignment. They were after us to pay, and we refused until the loss was determined on the job.

Q. Mr. Goerig, that is the one other question I wanted to ask you, whether or not to the best of your knowledge and belief there has been any payment made by Philp and Goerig on specifications 1062 or specifications 1068, covered by these Plaintiff's Exhibits A and B?

A. That is on these two jobs in question here? Not to my knowledge.

Mr. Holman: That's all.

Mr. Hawkins: That's all, Mr. Goerig.

(Whereupon, there being no further questions, the witness was excused.)

* * *

Mr. Hawkins: Mr. Goerig, will you take the stand, please?

A. J. GOERIG

recalled as a witness in his (2488) own behalf, resumed the stand and testified further as follows:

Direct Examination

By Mr. Hawkins:

Q. Mr. Goerig, you are a partner of Clyde Philp? A. Yes.

Q. Doing business as Goerig and Philp?

A. Yes.

Q. Handing you Goerig and Philp's identifications, will you state to the Court what that is?

Mr. Holman: It speaks for itself.

Mr. Hawkins: He's entitled to identify what is in his hands, for the purpose of the record. How is the appellate court going to know?

Mr. Holman: I submit the witness' conclusion is not the best evidence, your Honor.

The Court: I'll overrule the objection.

A. Well, it is a suit against Goerig and Philp, Clyde Philp and A. J. Goerig, individuals, and also Van Valkenburg and Mendel Rose; suit by the First National Bank to recover, suing us for——

The Court: Well, I think that goes into too much detail.

A. It is a suit of the bank for somewhere around \$37,000.00.

Q. This is a copy of a summons and complaint that was served upon you? (2489) A. Yes.

Mr. Holman: That I have no objection to. I move the rest of it stricken.

(Testimony of A. J. Goerig.)

The Court: Yes, it may be stricken. It is a copy of a summons and complaint served on him.

Mr. Hawkins: I will offer this in evidence, your Honor.

Mr. Holman: I object to it, your Honor, not on the question that this is not a substantially and probably a true copy; it purports to be a summons in King County case 381592, and a complaint, and a writ of garnishment, but the defendants are shown to be Philp and Goerig individually and as co-partners transacting business under the name of Goerig Construction Company, Mendel Rose, and H. C. Van Valkenburg, and in the writ of garnishment and complaint they are shown to be doing business as the Rovon Trading Company.

The Court: It seems to me this copy of summons and complaint at best could be only somebody's assertion that there had been an assignment of one of the documents in evidence here, and the interests of defendants Macri under that instrument. I'll sustain the objection. It wouldn't be evidence that there was an actual assignment, it seems to me, and the fact that they've been sued I (2490) don't believe would be a defense here, the action in state court itself, unless there had been an assignment. That is just the view I am expressing of it.

Mr. Hawkins: I don't contend it is *res judicata* or anything of that kind. Mr. Macri has testified that he has made an assignment to the bank of the claims he has out of this termination agreement which is in evidence, and this evidences the fact

(Testimony of A. J. Goerig.)

that the Seattle First National Bank has started action upon that assignment which Mr. Macri testified he made, and I think we're entitled to show that. Counsel has inferred this was given merely for collateral purposes, and that they were really owners of it, and therefore entitled to bring this action, but the fact is the assignment was made and the Seattle First National Bank is attempting to foreclose on that collateral, and we're attempting to show that, to show that the Macris have no cross-complaint in this action, and it is offered for that purpose; if the objection is on the ground that is not a certified copy——

Mr. Holman: I said I didn't raise that at all, but Mr. Goerig's testimony already shows that he's known of this assignment since last July, or some time ago, so the defendants Philp and Goerig have not been diligent in submitting proof here of something of which they claim they had knowledge a long while ago, and this is not the (2491) best evidence; it is not competent evidence.

(Testimony of A. J. Goerig. Mr. Hawkins, continued.)

The Court: I will admit it for the limited purpose of showing that suit has been instituted against at least Mr. Goerig, and he's been served with a copy of summons and complaint based on the assignment. Exception will be allowed.

Mr. Skeel: On behalf of the bonding company I also wish to submit an additional objection to this document, in that it in no way affects the bonding company or third-party creditors, that is, the plain-

(Testimony of A. J. Goerig.)

tiffs in this case. Furthermore, since there is no copy of the assignment on there, and since the summons and complaint shows on its face that it has to do with a job outside and additional to the jobs which this suit are based on; in other words, this is based on 1062 and 1068; I believe the complaint shows it is based on some other job having nothing to do whatsoever with this case.

Mr. Holman: I would like to join in the surety's objection also, principally on behalf of the creditor plaintiffs; they're not here.

Mr. Hawkins: In a sense counsel is correct, that it is based on a loss on another joint venture. However, it is one of the joint ventures mentioned in the termination agreement, and the complaint recites that the assignment has been made on all of these adventures, and therefore (2492) it is a simple matter for the bank, if they so choose to do, to amend that complaint and include this as well as the others. Of course, the reason they haven't done it at this point is that the loss hasn't been ascertained, but it will be done, there is no question about that.

The Court: I'll overrule the objections, and admit it for what it is worth.

Mr. Holman: Exception.

Direct Examination
(Continued)

By Mr. Hawkins:

Q. Mr. Goerig, do you know Mr. Macri?

A. Yes.

(Testimony of A. J. Goerig.)

Q. Did he handle these jobs that we're concerned with here, 1062 and 1068? A. He did.

Q. Did you have anything to do with these jobs?

A. No.

Q. Did you order any of the materials that are sued on in these actions? A. No.

Q. Did you order any of the labor in connection with those jobs? A. No. (2493)

Q. Did you have any supervision of those jobs?

A. No.

Q. Did Mr. Philp have any supervision of those jobs? A. No.

Q. They were solely under the direction and control of Mr. Macri?

Mr. Holman: Just a minute; I think on this last question I'll object on the ground it is leading.

The Court: It started out to be. Proceed.

Q. Did anyone other than Mr. Macri have anything to do with these jobs?

A. The Macri Company.

Q. That is—— A. Don, Sam——

Q. The Macri brothers?

A. The Macris, the Macri Company.

Q. Did you ever receive any of the letters that have been introduced in evidence here today?

A. I haven't seen them.

Q. With more particular reference to Plaintiff's C, D, E, F, G, H, I, J, and K?

A. No, I never saw any of them.

Q. Your answer was no? A. No.

Q. That they were never called to your atten-

(Testimony of A. J. Goerig.)

tion. Where (2494) did you and Mr. Philp maintain your office at the time these jobs were in progress? A. In the Lloyd Building, Seattle.

Q. And did the Macris have their own separate office? A. Yes.

Q. Where was that located?

A. Down off Jackson Street in Seattle, I think that they had it.

Mr. Hawkins: You may cross-examine.

Cross-Examination

By Mr. Holman:

Q. Mr. Goerig, it has been a fact, has it not, to the best of your information, that from the time you entered the joint venture agreements pertaining to these jobs, shown by Plaintiff's Exhibits A and B on to the completion of these jobs the work was conducted by Macri and Company, correct?

A. It was conducted by Macri and Company.

Q. Yes, sir. What, if anything, at any time, in any way, did either Mr. Philp, to your knowledge, or you do toward notifying any of the material men, laborers, or otherwise, on those jobs that you had terminated the Exhibits A and B?

Mr. Hawkins: Just a moment. Your Honor, there is not one iota of evidence in the record here that the material men or the plaintiffs in this case ever knew (2495) about the joint venture agreement in the first place, so it becomes entirely immaterial whether a notice was given of the termination.

(Testimony of A. J. Goerig.)

Mr. Holman: I want to know if he did notify anybody.

Mr. Hawkins: Well, it is immaterial. There is no testimony that they knew of it in the first place.

The Court: Well, I'll overrule it, and determine the effect of it.

The Witness: No.

Q. You knew, did you not, that there was material being furnished, there were labor items being accumulated, work was being performed there, did you not?

A. Well, on such a job there is always material and labor, yes.

Q. Now, is it or is it not a fact that the time the joint venture agreements, Macris' Exhibits 1 and 2, were entered into, that there was to be a bond signed by Macri and Company? Obligation for the performance of those jobs, to be——

Mr. Hawkins: I object to this question, your Honor. It is not material or germane to the direct examination at all.

The Court: I'm not sure that I got the question. Read it. (2496)

Mr. Holman: May I restate the question, your Honor?

The Court: All right.

Q. What I would like to know, Mr. Goerig, is whether or not you knew that each of these jobs covered by Plaintiff's Exhibits A and B required and would have to have surety bonds?

(Testimony of A. J. Goerig.)

A. I think in this case the bonds were already up by Macri and Company.

Q. You knew that?

A. I'm not positive now on that question.

Q. At least, it was a current matter that you were informed about, was it not, Mr. Goerig?

A. It was what?

Q. A current matter at the time you signed Defendant's Exhibits 1 and 2, it was a current matter that the bonding of these jobs would be covered?

Mr. Hawkins: Your Honor, I again renew my objection, I don't think your Honor ruled on it the first time, namely that this is not germane to the direct examination. I did not go into this question of the bond at all. I ask that all that testimony be stricken. I made an objection and there was no ruling of the Court on it.

The Court: I think I'll sustain the (2497) objection. The bond wasn't gone into on direct; it isn't cross-examination. Of course, I don't know that it is of very much practical concern, because he has been the witness of both sides here, and being an adverse witness, you could examine him by leading questions anyway. If you wish to open up your direct examination, I'll permit you to do so for that purpose.

Mr. Holman: I'm satisfied with the direct examination. No further questions.

(Whereupon, there being no further questions, the witness was excused.)

(The following stipulation was entered on February 25, 1947, during the trial of cause No. 246, and while the witness, R. M. Moorhead, was testifying on behalf of the defendants Macri.)

Mr. Hawkins: Will the record also show the objection as to Goerig and Philp?

I would like to ask that counsel stipulate any objection made by a defendant will apply to all defendants.

Mr. Olson: That is agreeable.

The Court: All right, the record may show that.

Reporter's Certificate

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and acting official court reporter of the District Court of the United States for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the District Court of the United States for the Eastern District of Washington, held at Yakima, Washington, on February 21, and February 25, 1947.

That the above and foregoing, consisting of 14 numbered pages (exclusive of this page) contains a full, true and accurate transcript of a stipulation and the testimony of A. J. Goerig occurring on February 21, 1947, and a stipulation occurring on

February 25, 1947, including all objections and the court's ruling thereon.

Dated this 2nd day of August, 1947.

/s/ STANLEY D. TAYLOR,
Official Court Reporter.

EXHIBIT J

(Summons typed on blank No. 190)

In the Circuit Court of the State of Oregon for the
County of Multnomah

166476

SAM MACRI, JOE MACRI and DON MACRI,
a Co-Partnership, Doing Business Under the
Assumed Name and Style of MACRI COM-
PANY,

Plaintiffs,

vs.

M. C. SCHAEFER, a Sole Trader, Doing Busi-
ness Under the Assumed Name and Style of
CONCRETE CONSTRUCTION COMPANY,

Defendant.

SUMMONS

To: M. C. Schaefer, a sole trader doing business
under the assumed name and style of Concrete
Construction Company, Defendant

In the Name of the State of Oregon:

You are hereby required to appear and answer
the complaint filed against you in the above-entitled

action within ten days from the date of service of this Summons upon you, if served within this County; or if served within any other County of this State, then within twenty days from the date of the service of this Summons upon you; and if you fail so to answer, for want thereof, the Plaintiffs will take judgment against you in the amount of \$40,000.00, together with interest thereon at the rate of 6% per annum from January 3, 1945, and their costs and disbursements incurred herein.

MAGUIRE, SHIELDS &
MORRISON,
JAMES G. SMITH,
Attorneys for Plaintiffs.

State of Oregon,
County of Multnomah—ss.

I, James G. Smith, one of the Plaintiffs' Attorneys, do hereby certify that I have prepared the foregoing copy of Summons and have carefully compared the same with the original thereof; and that it is a correct transcript therefrom and of the whole thereof.

Portland, Oregon, dated the 14th day of December, 1945.

/s/ JAMES G. SMITH,
Attorney for Plaintiff.

By.....,
Deputy,
.....,
Sheriff.

In the Circuit Court of This State of Oregon for the
County of Multnomah

No. 166476

SAM MACRI, JOE MACRI and DON MACRI, a
Co-Partnership, Doing Business Under the As-
sumed Name and Style of MACRI & COM-
PANY,

Plaintiffs,

vs.

M. C. SCHAEFER, a Sole Trader, Doing Business
Under the Assumed Name and Style of CON-
CRETE CONSTRUCTION COMPANY,

Defendant.

COMPLAINT

Come now the plaintiffs and for cause of action
against the defendant, complain and allege as fol-
lows:

I.

That during all times hereinafter mentioned, the
Plaintiffs Sam Macri, Joe Macri and Don Macri
have been and now are co-partners doing business
under the assumed name and style of Macri &
Company with principal place of business at Seattle,
King County, Washington, and with all said part-
ners being residents of said City, County and State.

.....

II.

That during all times hereinafter mentioned the
defendant, M. C. Schaefer, was a sole trader doing

business under the assumed name and style of Concrete Construction Company, with his principal place of business and residence in Portland, Multnomah County, Oregon.

III.

That heretofore and on or about the 18th day of May, 1944, the Plaintiffs entered into a written contract with the United States of America acting by and through its Department of the Interior, Bureau of Reclamation, said contract being contract No. 12r-14996, specifications numbered 1068, for the performance of earthwork, pipe lines and structural laterals and sub-laterals, Roza Division, Yakima project, Washington, according to the terms and specifications in said contract contained and provided, and particularly in accordance with said Specifications No. 1068.

IV.

That the said contract above referred to provided that the Plaintiffs might enter into sub-contracts in carrying out the provisions of said contract No. 12r-14996, and on or about the 21st day of April, 1944, the Plaintiffs entered into a written sub-contract with the Defendant, M. C. Schaefer, dealing as a sole trader under the assumed name and style of Concrete Construction Company, by the terms of which said sub-contract the said Defendant agreed to furnish all labor, and necessary equipment to do all the concrete work, form work, cut, bend and install all reinforcing steel; and to strip and clean all concrete forms, remove nails from same and pile

same in neat piles, all in accordance with the plans and specifications as set forth in said Specification No. 1068, Roza Division, Yakima Project, Washington; that a true, full and complete copy of said sub-contract entered into by said Plaintiffs and the said Defendant, M. C. Schaefer, is hereto attached, marked Exhibit "A," and by reference made a part of this complaint.

V.

That said sub-contract entered into by and between the Plaintiffs and the Defendant as aforesaid, provided that:

"Time being the essence of this Contract the Sub-contractor shall prosecute his work with a diligence and to the utmost of his ability and in a workman-like manner."

Said contract further provides:

"Commence the work when directed by the Principal Contractor and thereafter prosecute it continuously and diligently to completion.

"Coordinate the work covered by this agreement with that of all other sub-contractors and of the Owner and of the Principal Contractor. Use all reasonable means to avoid delay either in the work hereunder or in the work of others and cooperate with the Owner, the Principal Contractor and all other sub-contractors to facilitate the completion of the entire work. The sub-contractor shall be governed by such orders as the Principal Contractor may give as to the time and sequence in which the component parts of the work shall be done. The

sub-contractor shall not be entitled to any damages or additional compensation arising from, or because of any reasonable orders given or acts done by the Principal Contractor for the purpose of coordinating the work of all contractors, sub-contractors and material men. If the subcontractors shall be delayed in the performance of the work as a result of such orders or acts, the Subcontractor shall be entitled to an extension of time equal to the delay so caused; provided, however, that written notice of the fact and cause of such delay be given by the sub-contractor to the Principal Contractor within five days after the occurrence of the cause of such delay and said extension of time shall be thereafter determined and allowed and specified in writing by the Principal Contractor. The Subcontractor shall assume full responsibility for and indemnify the Owner and the Principal Contractor against all loss, cost and expense which may result from Subcontractor's delaying the progress or completion of the entire work.

VI.

That thereafter, on or about the 30th day of November, 1944, the Plaintiffs directed the Defendant to commence performance of the work called for under said sub-contract, such order having been given by letter, a full, true and correct copy of which is hereunto attached, marked Exhibit "B" and by this reference made a part of this complaint.

VII.

That the Defendant failed, neglected and refused

to commence performance of said work provided for by said sub-contract when directed to do so by the Plaintiffs and failed to coordinate the work covered by said sub-contract with the work of the other sub-contractors and with the work of the Plaintiffs as principal contractor as required by the terms and provisions of said sub-contract, and continued to fail, neglect and refuse to perform said work or any part thereof.

VIII.

That on the continuing failure of the Defendant, M. C. Schaefer, to carry on the performance of his said sub-contract and to coordinate the work provided for thereunder with the work of the other sub-contractors and of the principal contractor, the Plaintiffs, on the third day of January, 1945, notified the Defendant in writing that he was in default and that the Plaintiffs would take over and perform at Defendant's cost the work described in the said sub-contract; a full, true and complete copy of said notice marked Exhibit "C" is attached hereto and by this reference made a part hereof.

IX.

X.

That thereafter the Plaintiffs herein did take over and now have fully performed the work provided by the sub-contract between the Plaintiffs and the Defendant; and likewise the Plaintiffs have now fully and completely performed the principal contract No. 12r-14996.

XI.

That the Plaintiffs have fully kept and performed all the terms and conditions of their said sub-contract with the defendant on their part to be kept and performed.

XII.

That by reason of the failure of the Defendant to perform the work agreed to and provided for by the terms and conditions of said sub-contract and by reason of his failure to coordinate the work covered by said sub-contract with the work of the other sub-contractors and with the work of Plaintiff as principal contractor; and by reason of his default under said sub-contract and his breach thereof, the Plaintiffs herein suffered damages in the amount of \$40,000.00.

XIII.

That there is owing by the Plaintiffs to the Defendant an amount not in excess of \$1,449.87 by reason of defendant's performance of a sub-contract entered into by and between the Plaintiffs and the Defendant in connection with the performance by the Plaintiffs as principal contractor of certain work under Contract No. 12r-14625, Specifications No. 1062, Roza Division, Yakima Project, Washington; and Plaintiffs are now willing that all amounts which Defendant is entitled under said sub-contract may be deducted from any amount to which Plaintiffs may be entitled under the allegations of Plaintiff's complaint herein.

Wherefore, Plaintiffs pray for judgment against the Defendant M. C. Schaefer for the sum of \$40,-

000.00, together with interest thereon at the rate of 6% per annum from the 3rd day of January, 1945, and for their costs and disbursements herein.

TOM W. HOLMAN,
MAGUIRE, SHIELDS &
MORRISON,
Attorneys for Plaintiffs.

EXHIBIT K

“This will supply the information requested in your call to this office on August 8 concerning the procedure to be followed in connection with claims against contractors holding bonded government contracts.

“Accounts for services or materials that are definitely related to this contract are fully protected by a payment bond which the Government contractors are required to execute. The Government does not participate directly in the settlement of such accounts, but the provision of the bond become available in the event that a suit becomes necessary.

“The procedure in cases of this kind is as follows:

‘Under the Act of August 24, 1935 relating to payment bonds, a sub-contractor or material man may file suit after the expiration of 90 days from the day the last labor was done or material furnished, and within one year from the date of final settlement. A person who has no direct contractual relationship with the contractor

must notify said contractor of his claim within the 90-day period by registered mail. For a complete description of details and procedure, you are referred to the act which is printed in 49 Stat. 793, 40 U.S.C.A., 270(a) etc.'

"The Macri Company was bonded by the Continental Casualty Company, P.O. Box #586, Yakima, Washington. It is suggested that the bonding company as well as the Macri Company, be notified of the account by registered mail."

EXHIBIT L

"As yet there has been no appearance by any of the Defendants in either of the cases here but I have just secured some information which will probably make it desirable for us to file an amended complaint. I have learned that a Mr. Clyde Philp and Mr. A. J. Goerig of Seattle had entered into a joint venture agreement with the Macris under which agreement they were to share in the profits and losses of this transaction, and my information is that both of these gentlemen are very much financially solvent while the financial position of the Macris may or may not be so good. I would like to hear from you as to whether or not Mr. Schaefer had any knowledge or information as to the connection of Mr. Philp and Mr. Goerig with this transaction or whether they were entirely silent partners as far as he was concerned. My informa-

tion is also that the joint venture agreement was entered into in December of 1943, and that in July of 1944 another agreement was entered into under which the joint venture agreement was attempted to be terminated.

“* * *Confidentially and for your information, the source of my information as to the joint venture is from the bonding company in this case, which, of course, is anxious to have some solvent defendants added to the case, but I have assured them that neither of us would reveal to the Macris or to Mr. Philp or Mr. Goerig the source of our information. * * *”

EXHIBIT M

COURT'S OPINION

The Court: Mr. Olson, I think I might save time here by announcing the Court's views, and then I'll give you an opportunity to be heard on those points on which my ruling is adverse to you or your client, Mr. Schaefer.

I necessarily will have to deal with these issues generally, and what I am trying to do is to lay some reasonable basis for the drafting of the findings of fact and conclusions and the various judgments that will have to be entered.

Taking up first Mr. Schaefer's suit against Mr. Macri on subcontract 1062, the arrangement there was that Mr. Schaefer was to construct the concrete structures in place, furnishing certain mate-

rials that were listed in the subcontract. Mr. Macri agreed to furnish the form lumber and to do the excavation work. The specifications that are in evidence here pertain, or do not contemplate, I should say, any subcontracting of a part of this work. They naturally pertain to the work of the general contractor under his contract with the government, and they provide that the government will pay for excavations in those instances where clearance is required in the excavations, the removal of common earth one foot out from (2451) the base of the concrete structure and on a slope of one to one. The government naturally was concerned wholly with the matter of payment, because since they required only that these structures be built and installed according to specifications in the places specified by them, it didn't make any difference to them how much excavation the general contractor might make or might not make. All they required of him was that he put in the concrete according to their requirements, but here we have a dividing of the work, not, certainly, directly contemplated by the specifications, where the contractor is to do the excavating, and the subcontractor is to build and install the forms and pour the concrete.

In that case there would be an implication, certainly, that the excavation was to be done in such a way as to afford reasonable clearance, a reasonable opportunity for the subcontractor to properly and efficiently and without undue expense put his forms in the excavation and carry out his part of the work.

It is the view of the court that the pay provisions of the specifications as to clearance and slope are not absolute requirements. I do not believe that they obligated Mr. Macri to cut the banks to a slope of one to one in those instances, as I have said, where clearance was required, where a form had to be placed between the concrete and the bank, but I think that they are very persuasive as to what would be (2452) reasonable. The Reclamation Bureau, with its long experience in construction of this kind, I assume wouldn't pay for more excavation of more dirt than was reasonably necessary for the contractor to install his form, so I think the best evidence we have, the best indication we have, as to what was reasonably required is the fact that the Reclamation Bureau would pay for dirt excavated one foot out at the base and on a slope of one to one.

The evidence is overwhelming that excavation was not made in that manner. It was made, the Court finds, approximately one foot out from the base, with practically vertical banks; that is, with only the slope that would naturally result from the excavation by the use of Macris' hoe-type shovel. A significant piece of testimony, it seems to me here, is that of Mr. Ashley, who was Macris' superintendent for a period of time on this job. He testified, if my memory serves me right, that during his period as superintendent he staked out the excavations to be dug, and that his stakes were one foot out from the outer wall of the concrete at the surface of the ground; that he staked them out that

way, and certainly the people who came after him would follow the superintendent's directions, and excavate them not more than one foot out, and that's not at the base, it was at the surface, so there was no effort on Mr. Macri's part to excavate out one foot, and it seems to me equally obvious, aside from the testimony in (2453) the case, that that was not reasonable and proper clearance in the structure and form. We have in evidence here there are between the concrete and the outer bank the shiplap, which I assume would be approximately an inch thick, less whatever is planed down, the two-by-fours forming the framework, and then what's been referred to, I think, as the strong-backs, an additional two-by-four there, which makes approximately nine inches of form outside of the concrete, so that a foot would give only an additional clearance of three inches, which obviously isn't sufficient regardless of the manner of operation of this so-called shebolt or clamp, or whatever it may be; and the court finds that the excavation was not done in a manner to give sufficient clearance, that there was not sufficient slope, there was not sufficient width in the excavations to enable the subcontractor to efficiently and properly install his forms, and that he was delayed and hindered in the progress of the work, and that his carpenters installing the forms had to make extra excavation, and that this was the rule rather than the exception in the progress of the work.

In that connection, I find also that the fine grading was not done according to the layout plans and

specifications, that it was defectively and improperly done, and that in most instances the carpenters had to do the fine grading before they could install the forms, and that that also increased (2454) the amount of work Mr. Schaefer had to do, and hindered his progress and interfered with his progress of the work.

I also find that the excavations were not made on time and in an orderly sequence and manner, so as to enable the subcontractor to proceed as he should have been able to do with prompt progress of the work.

Now, with reference to the lumber which Mr. Macri was to furnish under the subcontract, I find on the evidence here that sufficient lumber was not furnished; it was not furnished on time, and the quality was not proper and suitable for the work intended. It is true, I think, that there was some lumber there most if not all of the time during the progress of the work, but much of the time there was missing some essential type of lumber, such as the two-by-fours or the shiplap or some particular kind of lumber or plywood required, so that the work was hindered and delayed because of the lumber not being promptly furnished, not furnished in sufficient quantity, and not furnished in the quality that was the minimum requirement, I should say, for work of this kind.

I make that finding despite Macri's identification 104, because I think Miss Callahan testified that she had been told what bills to put in here; she made up that exhibit from the invoices that had been sent

in by people furnishing lumber. She didn't know whether the lumber went on the job or not, and took the invoices at the direction of somebody (2455) else, and then Mr. Klug testified that that was the kind of lumber that could have been used on this job; my recollection of the testimony is that he didn't say that this particular lumber was used, but it was the kind that could have been used on the job, and I think Mr. Klug on the stand tried to minimize the situation with reference to the shortage of lumber. I think his statement more clearly represents the fact that there was a shortage of lumber, as he said in his statement.

In short, the court finds that Mr. Macri breached the subcontract, or those portions of them to be performed by him in the particulars which I have designated; that his breach was wilful and negligent, and that was true both as to the character of excavations and fine grading and time it was done, the amount and quality of lumber and the time it was furnished, and that this breach on Mr. Macri's part was a continuing breach, which continued and existed and persisted throughout the entire performance of this contract until the very end of its performance by Mr. Schaefer.

I think that the conversations between Mr. Macri and Mr. Schaefer were substantially as testified by Mr. Schaefer and his witnesses. I think that on these occasions mentioned Mr. Schaefer complained, and in that connection Mr. Schaefer complained, he or his men complained, repeatedly and frequently to Mr. Macri and to Mr. Macri's agents on the job,

and Mr. Macri (2546) had notice of these complaints. He had notice and knowledge of his failure and his agents' failure to perform the contract according to its terms; that he accepted and acted upon oral complaints and notices to that effect; that he knew of the condition, and that he waived any and all requirements as to written notice contained in the contract, by his conduct.

Coming back to those conversations, it is the view of the Court that Mr. Schaefer did complain, and stated that he would pull off the job, or in effect, that if conditions weren't improved, and that Mr. Macri on several occasions promised that he would do better, and that he would see that things were done in accordance with the requirements of the contract, or in a proper manner, and that he did tell Mr. Schaefer substantially as Schaefer and his witnesses testified, that if he would go on and complete the contract, he wouldn't lose anything on the contract, nobody had ever lost on his contracts, and that he would make it right and pay him for what he might lose under the adverse conditions created.

However, the court cannot find under the record here that there was a meeting of the minds, or an express contract that Mr. Schaefer was to continue to complete the work and do what fine grading was required by the defective conditions of the excavations, and was then to be paid for the reasonable value of all his costs. I think such a finding would be inconsistent with the other testimony in the case here, and (2457) with the conduct of Mr. Schaefer. He refused specifically to take over the fine grading

and excavating when Mr. Macri, according to the testimony, offered to turn it over to him. He continued to complain. It's hard to conceive how he would have cause for complaint if he was to get paid for everything anyway, but he continued to complain, and I think his conduct isn't consistent with a meeting of the minds and an express contract that Mr. Macri was to pay for the fair value of the services.

However, I think that Mr. Macri did by his representations induce Mr. Schaefer to go on, by his promises that the bad conditions would be remedied. I think that Mr. Schaefer did go on by reason of these representations, and performed this work, which was accepted by Mr. Macri and which went into the job, and that under the circumstances it would be extremely inequitable for Mr. Schaefer not to be paid the fair and reasonable value of his services. In other words, it is the view of the court that there was an implied contract, or perhaps it would be more accurate to say a quasi-contract, that Mr. Schaefer was to be paid the fair and reasonable value of the performance of this contract under the conditions and with the extra burdens imposed upon him by Mr. Macri's breach.

Now, coming to the law applicable to this situation, it is of course difficult, and I am frank to say I think that the case cited by Mr. Ivy, *United States vs. John A. Johnson and Sons*, (2458) 65 F. Supp., page 527, if it were followed, would preclude recovery by Mr. Schaefer, at least against the bonding company. However, it is my view that in these

cases, although there is involved the construction of the Federal statute, the Miller Act, that nevertheless, so far as the substantive rights are concerned, that the law of the state is entitled to first consideration. This act, which the courts have said numerous times should be liberally construed, because of evidences and intent on the part of Congress that all persons furnishing labor and materials that go into public contract work should be fairly and reasonably compensated for their services, is very closely analogous to the public improvement statutes of the State, and as I read the cases, while there is none that is squarely in point with this one in its facts, the implication of the decisions of the Washington State Supreme Court and the language employed indicates that that court subscribes to rules similar to that applied in *Susi vs. Zara*, that where the contract is breached by the main contractor, the subcontractor is then entitled to the fair and reasonable value of his services rendered in performance of the work, and that that includes an appreciation of the amount necessary to spend by reason of the breach, including delay occasioned by the main contractor.

The *Susi* case, as has been pointed out, is not squarely in point here, perhaps because there the contract was never (2459) completed by the subcontractor, and the question was not decided as to whether the subcontractor in recovering the fair and reasonable value of his services could go entirely beyond the total amount of the bid price provided in the subcontract. In the *Susi* case, the

main contractor took over the contract when it was partly performed, and made it impossible for the subcontractor to complete it, and the court held that the subcontractor could recover for the reasonable value of the work and services performed up to that time, and was not bound by the unit prices of the contract, and could recover against the bonding company. I think the thing that makes the Susi case applicable here was that here we have a continuing breach. There was a completion of performance, it is true, but there was a breach right up to the last day of the work, by Mr. Macri; there continued to be a breach, and therefore I think the principle of the Susi case would apply.

Mr. Schaefer, electing to perform in the face of the breach by the main contractor, was entitled to the fair and reasonable value of the work, and since the recovery is not for damages for contract, but for the fair and reasonable value of the services, I think under the decisions of the State court that Mr. Olson cited here and were cited in his brief, that the subcontractor is entitled to recover on that basis against the bonding company also. (2460)

The case that hasn't been cited here, and is very closely analogous to this one as to facts, McDonald vs. Supple, an Oregon case, 190 Pacific 315, I think deserves attention. It is, of course, only persuasive, as the Pennsylvania Federal District Court case is persuasive, not controlling, but it appeals to me as being equitable, and squares fairly well with what the Supreme Court of the State of Washington I think has indicated as its view in cases of this

character. In McDonald vs. Supple there was a government contract to construct dredges by the subcontractor, parts and materials to be furnished by the main contractor. The subcontractor brought suit on the theory that there had been an oral modification of the written contract. The lower court held that there had not been an express modification of the written contract by oral agreement. The plaintiff then amended, alleging that there had been an implied modification by implied agreement, to pay the fair and reasonable value of the work done and required to be done by reason of the breach of contract on the part of the main contractor.

The court held first that there was no inconsistency between an allegation of an expressed oral modification and an allegation of an implied contract to pay the fair and reasonable value, and overruled a demurrer to the amended complaint. The court also sustained recovery on the basis of the fair and reasonable value of the services, and the amount (2461) and value of the work to be done by the subcontractor was greatly increased in that case because of circumstances closely analogous with those in this case, that is, that the materials to be furnished by the contractor were not furnished in time, nor in an orderly manner; they were defective; the subcontractor had to have a large crew of skilled workmen standing by; they couldn't work efficiently because of the breach of the contract on the part of the main contractor. The court on page 317 of the opinion states:

“The amended complaint averred, and the testimony on behalf of the plaintiff tended to show the defaults on the part of the defendant Supple in the performance of the original contract were so numerous and so vital that they caused the plaintiff Wakefield to perform his labor under different conditions, at a different time, and in a different manner than contemplated or agreed upon by the parties in the original writing, and so much more burdensome and difficult than was originally agreed upon that plaintiff Wakefield was not required to accept the compensation fixed in the original contract as the measure of his recovery, but by reason of the important changes in the work to be done, and the defaults on the part of defendant Supple in his performance of the contract, plaintiff is entitled to recover in addition to the contract price, such a sum as would reasonably compensate him for the services performed by him and accepted by the defendant.”

And again on page 318:

“The testimony on behalf of the plaintiff tended to establish such changes in the work caused by the failure of the defendant to perform his part of the contract which made the labor more burdensome and extended the same to two or three times the amount it would ordinarily have been if the material had been delivered at the time and in the condition

agreed upon. Therefore the plaintiff could properly recover on quantum meruit."

(Cases cited.)

This paragraph is also rather interesting; it throws light on one of the controversies in this case, continuing on the same page:

"Under the contract Wakefield was entitled to partial payments as the work progressed, and he submitted various statements to defendant with such object in view, and accepted money under such estimates. It was not contemplated that such advance payments should be a final settlement of any part of the work, and the contention of defendant that plaintiff is thereby estopped from claiming additional compensation cannot be maintained. The evidence tended to show that in different conversations between Wakefield and Supple, the latter told Wakefield in effect to go ahead and do the work, and Supple would make it all right with him when he got through."

Now, as I say, of course that case isn't controlling; it is merely persuasive, but it appeals to the court as appropriate, and not, certainly, in conflict with the announced decisions of the Supreme Court of the State of Washington. Now, I should say, too, of course, that the bonding company was not involved in the Supple case, but it seems to me that it logically follows that if recovery is allowed on quantum meruit, that is, for the fair and reasonable value of the services that go into the work,

that it isn't damages, as was held in the Pennsylvania case, but is for work and services that entered into the work, and that the bonding company should be held to compensate for the work and services.

Certainly the rule is that a bonding company which has a performance bond for a main contractor is not bound, to its detriment, by the provisions of the subcontract as to the price of the work to be performed. If a general contractor makes a subcontract to do a part of the work for twice its reasonable value, the bonding company isn't bound by that contract, and conversely, it seems to me they should not be able to claim the price in the subcontract to their benefit, where the reasonable value of the work and services under the (2464) circumstances that they were actually performed exceed the contract price.

Now, that brings us to the question of the amount which Mr. Schaefer is entitled to recover. The plaintiff's Exhibit 63, which is the plaintiff's statement of costs on this work, I think forms a fair basis for determining the amount of recovery. However, I'll say at the outset that it is the view of the court that plaintiff is not entitled to recovery of interest prior to the entry of judgment. It seems to me that this is an unliquidated claim. It necessarily must be so. If Mr. Schaefer is entitled to recover only for the fair value of his services, it required and would require testimony as to the amount and value of those services, so that they could not be liquidated until that evidence is received and passed upon by the court, so that the

view of the court is he's not entitled to interest prior to the date of judgment. \$57,618.87, and from that I think should be deducted the legal expense of \$533.57, and the engineering expense of \$201.25.

I had some difficulty coming to a conclusion as to whether general overhead should be included. I'm inclined to think that it should, because it is a part of the fair and reasonable value of this work. A carpenter doesn't just go out by himself and build forms, or the workman pour concrete. He does it under the direction and aid of an established (2465) business organization, and all of the expenses of that organization, including general overhead, go into the work. The item of profit is another troublesome one. However, as I recall, in the Denny Regrade case a profit of fifteen per cent was allowed there on one of the extra items, to Vigilante, I believe it was, on the transporting of the dirt to the place where it was dumped in Elliott Bay. At any rate, I'm inclined to allow \$57,618.87, less the two items mentioned, for engineering services and legal expense.

The bonding company is entitled to judgment back against Macri for the amount and costs and a reasonable attorney fee. It is difficult to make a compromise or adjustment between what should be paid for a long, drawn-out case of this magnitude, with the amount involved, and some consideration for what the traffic should be required to bear in the way of the burden imposed upon the losing parties here. I am inclined to think that while it would not be adequate under other circumstances,

that fifteen hundred dollars would not be unfair or out of the way. Have you any suggestion on that, Mr. Ivy? I would welcome a suggestion if you wish to make it, before I definitely fix an attorney fee.

Mr. Ivy: Your Honor, in my brief I left it to the discretion of the court.

The Court: Yes, I know you did. Well, that's the amount the court determines. Now, we come to the question of (2466) whether the bonding company can recover judgment back against Goerig and Philp. I'm inclined to think they can. I haven't my notes here. I find myself somewhat in the position of a man who gets chlorine gas. He drowns in his own secretion. I'm almost at that point with my notes I have taken. I haven't my notes here, but I have a general statement of the law as to dormant and silent partners. This joint venture creates a situation that I think we can, for the purpose of this case, say is analogous to a partnership. Once you establish joint venture, about the only difference between it and a partnership is the difference in the scope of the two as to what business and activity is covered, but here we have a situation analogous to that of a partnership, in which two of the partners, Goerig and Philp, are dormant or silent partners, and the statement of the law which I have in mind is from *Corpus Juris*, to the effect that the liability of a dormant partner prior to dissolution of the partnership, on any contracts entered into by one authorized to do so for the partnership, and within the scope of the busi-

ness, the liability of a dormant or silent partner does not depend upon knowledge of the third person to the contract or dealing with the same, of the existence or relationship of the silent partner; that it depends upon the silent partners being parties to the authorized contracts of the partnership, and further based upon a consideration of public policy because it would open the door wide to chicanery and fraud if people were permitted to make secret agreements as to their liabilities which they could change at will to the detriment of third persons, so that the liability does not depend upon the fact that the person dealing with a firm knows of the existence of a silent partner and depends upon his credit.

If the partnership enters into an authorized contract during the existence of the partnership, the silent partners then become members of that partnership, or become parties to that contract, the same as if they had personally signed it, and are bound until they are released in a way by which parties can ordinarily be released from their contracts, and here I consider it immaterial that as to 1062 the bond application was actually signed prior to the execution of the joint venture, because I think a partnership may adopt, as this one expressly did, may adopt prior contracts of one of the parties just as they may be bound by subsequent contracts, and I think here under the circumstances and the wording of this joint venture, that the parties did expressly or by implication adopt the contract of Mr. Macri with the government on 1062,

and with the bonding company on the application for the bond on 1062, and of course, the bonding company having once been bound continued to be bound. Its obligation was fixed and determined, and what remained then (2468) was to just ascertain the extent of the liability of the bonding company, in the light of subsequent events. The bonding company couldn't release itself once it had executed the bond, and therefore I think Goerig and Philp became bound under the indemnity contract, indemnity against loss, contained in the application executed by Mr. Macri.

As to Goerig and Philp's liability to Schaefer, and while it might seem at first blush that that is unimportant, I think that it might very well be, because this is a close case, and these questions are close and in some respects novel ones; and if the appellate court should hold that the bonding company are not liable, then I think the question of whether Goerig and Philp are bound would be important. I don't think they are, because it is a quasi-contract arising after the contract terminating the joint venture. That contract, still carrying the analogy of the partnership, I think dissolved the partnership; it terminated it, brought it to an end. The only thing remaining then was a contract that Goerig and Philp would reimburse Macri under certain circumstances, for a portion of his losses, and I don't believe Goerig and Philp should be liable for any contract entered into in the name of this joint venture, or by Mr. Macri operating for it, subsequent to the date of the agreement

terminating the joint venture, and as I view the theory of this case, and the theory upon which I decide it, that contract, quasi or implied (2469) contract, arose out of conduct that was subsequent to the termination agreement.

I am announcing these things, Mr. Olson, as I stated at the outset, with the understanding that in any points where my decision is adverse to your client, you will have an opportunity to be heard before my ruling becomes final. I thought it might save time if I just announced what I had in mind here.

Mr. Olson: It undoubtedly has, your Honor.

The Court: Is there anything that I've overlooked here, between one party and the other?

Mr. Holman: I call your Honor's attention to the fact that Macri affirmatively pleaded——

The Court: Oh, yes, 1068, you mean?

Mr. Holman: Oh, no; Macri affirmatively pleaded and proved the levy by the United States arresting any funds in the hands of Macri that might then be due to Mr. Schaefer, and Mr. Schaefer admitted on the stand that that had not been paid, so I think that's an issue here and we're entitled to that protection.

The Court: Well, it isn't directly before the court here. This court can't decide now whether Mr. Schaefer owes the government ten thousand dollars, or whatever it may be, or whether he doesn't owe them. This notice of levy is in the nature of or might be analogous to a writ of garnishment (2470) against you.

Mr. Holman: Yes, your Honor, and we've pleaded that, and Mr. Schaefer has admitted the obligation is still due, and it's not been denied.

Mr. Olson: Mr. Schaefer said he had not paid that to the government, that's all.

The Court: But he hasn't admitted liability on it, as I understand it. Well, it seems to me about the only thing I can do here is to provide that any action to enforce collection of this judgment as to Mr. Macri, to the extent of the amount shown in this, shall be stayed until determination of this controversy.

Mr. Holman: That's my idea.

The Court: That will protect your client from the payment of that part of the judgment, and when I asked if I had overlooked anything, I meant as to 1062. I haven't, of course, got to 1068 yet.

Mr. Ivy: One matter I wasn't clear about in 1062. You made a statement that the bonding company would only be liable for the fair and reasonable value of the services under quantum meruit that had been allowed against the principal contractor, but not in excess, I understood, of the contract. You were discussing the amount of the value, the extent of the contract.

The Court: No, I didn't intend to make any such statement (2471) as that. I'm glad you called it to my attention, because I had overlooked saying that the court finds that the fair and reasonable value of the work and services performed and materials furnished by Mr. Schaefer in the prosecution of the work contemplated by specifications 1062 is the

amount shown in his exhibit 63, plaintiff's exhibit 63, with the exceptions noted of interest and attorney fees and engineering service. The court finds that is the fair and reasonable value of the work and services performed under the circumstances created and existing by Mr. Macri's breach. Now, as to 1068, the court finds that there was a breach of that contract by Mr. Macri.

Mr. Olson: I hesitate to interrupt, but that item of fifty-seven thousand, that's after, of course, there has been credited on the——

The Court: I see what you have in mind. I didn't mean to use that particular item. I'm glad you called that to my attention. The court finds that the fair and reasonable value of the work and services are as stated in this exhibit, prior to the application of the amount paid, with the exceptions I have noted already.

As to 1068, the court finds the defendant Macri breached that contract; at the time he called upon Mr. Schaefer to perform, there were no excavations there, and even up to the time he gave notice he was taking it over, there had never (2472) been any excavations fine graded and ready to receive forms. It would have been impossible for Mr. Schaefer, and was impossible, for him to comply with the demand that he proceed with 1068. However, under the circumstances existing here, the court is of the view that the showing of damages by way of loss of prospective profits is too speculative and uncertain and vague to warrant a recovery on the part of Mr. Schaefer. It's true that there is evi-

dence as to what this work could have been done for, but looking at it broadly, the court must recognize Mr. Schaefer had lost a lot of money on one contract; he was still engaged in that contract under an arrangement where he had to continue regardless of the difficulties encountered; his equipment was tied up, and continued to be until about March or April, 1945, I believe, and under the circumstances it doesn't seem to me that there's a showing here that Mr. Schaefer could have arranged for, bought or rented additional equipment, could have come on here and made a profit on this work, assuming, and I'm not too sure about that, that prospective profits could be recovered in a case of this kind.

The judgment of the court will be, therefore, subject to hearing counsel on the matter, that Mr. Schaefer should recover one dollar nominal damages against Macri only on 1068. Now, if you wish to be heard, Mr. Olson, I think you have some time left. (2473)

(Argument by Mr. Olson.)

The Court: Well, I know it is a close and difficult question, but I'm still of the view that there wasn't a substantial beginning of the performance of this contract until about the 31st of July, as I remember, or the first of August, when they started pouring concrete, and while the conduct of Mr. Schaefer, or Mr. Macri, I mean, would relate back to those conversations, I don't regard any one of them as final and controlling importance. I think

the conversations, taken with the continuing breach by Mr. Macri, and his conduct, give rise to a situation where Mr. Schaefer was entitled to compensation for the fair and reasonable value of his services, and the services were rendered after the termination agreement. I know it's close, but I'm still of that opinion. My statement, by the way, that there hadn't been substantial performance by Mr. Schaefer, I didn't mean to say that Mr. Schaefer didn't do everything he could up to that time in the way of preparation in the light of the breach by the other party. I just wanted to make that clear.

I might say that I always try to keep my mind fixed so it can be changed on occasion, and I shall go over these briefs that have been submitted. I haven't had sufficient time to properly digest Mr. Ivy's brief, although he went into it to some extent in his argument, and I just received Mr. Holman's last brief, and I'll get over these, and I don't want (2474) to rehash this whole thing over again. I'll consider all of these points, and if I come to some different conclusion in whole or in part, will advise counsel prior to the time that the findings and judgment are entered. (2475)

EXHIBIT N

In the District Court of the United States for
the Eastern District of Washington, Southern
Division

Civil Action No. 246

THE UNITED STATES OF AMERICA for the
Use of M. C. Schaefer, an Individual Doing
Business as Concrete Construction Company,

Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J.
GOERIG and CLYDE PHILP, Individuals
and Co-Partners Doing Business as Macri Com-
pany, and CONTINENTAL CASUALTY
COMPANY, a Corporation,

Defendants.

JUDGMENT

The above-entitled cause having come on duly and
regularly for trial before the Hon. Sam M. Driver,
Judge of the above-entitled Court, on the 24th day of
February, 1947, the use Plaintiff, M. C. Schaefer, an
individual, doing business as Concrete Construction
Company, appearing in person and by his attorney,
Harry L. Olson, of Olson & Palmer, and the Defend-
ants Sam Macri, Don Macri and Joe Macri appear-
ing by Sam Macri, and each of said Defendants
Macri appearing by and being represented by their
attorney, Tom W. Holman of Brethorst, Holman,
Fowler and Dewar, and the Defendants A. J. Goerig

and Clyde Philp appearing by A. J. Goerig and their attorney Kenneth Hawkins of the firm of Brown & Hawkins, and the Defendant, Continental Casualty Company, appearing by its attorney, Eugene D. Ivy, and the Plaintiffs having waived in open Court their demand for jury, upon motion having been made by each of the Defendants for withdrawal of the case from the jury and the case having proceeded to trial before the Court without a jury, the Hon. Sam M. Driver presiding and having heard and considered the evidence submitted by the parties, both oral and documentary, and having heard and considered the arguments of counsel and written briefs filed in the matter, and the (82) Court being fully advised in the premises and having heretofore made and entered its Findings of Fact and Conclusions of Law, now, therefore,

It Is Hereby Ordered, Adjudged and Decreed That the use Plaintiff, M. C. Schaefer, have and recover judgment against the Defendants, Sam Macri, Don Macri and Joe Macri, individuals and co-partners, doing business as Macri Company, and the Continental Casualty Company, a corporation, and each of them, for the sum of \$56,764.97, together with interest thereon at the rate of 6% per annum from the date hereof until paid, and for the use Plaintiff's costs and disbursements herein expended and incurred in the amount of \$921.70.

It Is Further Ordered, Adjudged and Decreed That Plaintiff's complaint as to the Defendants A. J. Goerig and Clyde Philp be dismissed with prejudice and without costs.

It Is Further Ordered, Adjudged and Decreed That the Defendant, Continental Casualty Company, an Indiana corporation, have and recover judgment against the Defendants Sam Macri, Joe Macri and Don Macri, A. J. Goerig and Clyde Philp, and each of them, in the amount of \$56,764.97, together with interest thereon at the rate of 6% per annum from the date hereof, and for the further sum of \$1,750.00 for said Continental Casualty Company's attorney's fees herein, and for its costs and disbursements herein taxed in the amount of \$none, together with interest at 6% from the date hereof.

It Is Further Ordered, Adjudged and Decreed That the use Plaintiff, M. C. Schaefer, have and recover judgment against the Defendants, Sam Macri, Joe Macri and Don Macri, co-partners and individuals, doing business as Macri Company, for the sum of \$1.00 damages as to Specifications 1068 which amount shall bear interest at 6% per annum from the date hereof.

It Is Further Ordered, Adjudged and Decreed That the cross-complaint of the Defendants, Sam Macri, Joe Macri and Don Macri, against the use Plaintiff be and the same is hereby dismissed with prejudice and without costs and that said Defendants recover nothing thereby.

It Is Further Ordered, Adjudged and Decreed that the judgment of the use Plaintiff entered herein is subject to the lien of the United States

of America under its certificate of levy, copy of which was received in evidence as Macris' Exhibit 67. (83)

It Is Further Ordered, Adjudged and Decreed That the cross-complaint of A. J. Goerig and Clyde Philp against the Defendants, Sam Macri, Joe Macri and Don Macri, be and the same is hereby dismissed without costs.

Done in Open Court this first day of May, 1947.

SAM M. DRIVER,
Judge.

Presented by:

HARRY L. OLSON,
Of Attorneys for Plaintiff.

[Endorsed]: Filed May 1, 1947. (84)

EXHIBIT O

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now, Continental Casualty Company, a corporation, one of the defendants in the above-entitled cause, and moves the Court for an order vacating and setting aside the judgment in the above-entitled action and awarding a new trial for the following reasons:

1.

That judgment was not sustained by substantial evidence.

2.

That judgment was contrary to law.

3.

The Court erred in finding that any sum in excess of \$2,656.46 was owing by this defendant, Continental Casualty Company, a corporation, to the plaintiff.

4.

The Court erred in finding as a fact that the law of the State of Washington applied and that the Federal rule as to damages did not apply.

5.

That the Court erred in entering judgment against the defendant, Continental Casualty Company, for any sum in excess of \$2,656.46. (85)

6.

That said motion is further based upon all the files and records in said cause.

Dated this 8th day of May, 1947.

EUGENE D. IVY,

Attorney for Defendant,

Continental Casualty Co.

[Endorsed]: Filed May 9, 1947. (86)

EXHIBIT P

ORDER DENYING MOTIONS FOR NEW TRIAL

The above-entitled cause having come on regularly for argument on the 20th day of May, 1947, upon the motion of A. J. Goerig and Clyde Philp and upon the motion of Continental Casualty Company, a corporation, for a new trial in the above-entitled matter, the Continental Casualty Company appearing by and through its attorney Eugene D. Ivy, and the defendants, A. J. Goerig and Clyde Philp appearing by and through their attorneys, Brown & Hawkins, and the use plaintiff appearing by and through his attorney, Harry L. Olson, and the Court having duly considered said motions and argument of counsel and being fully advised in the premises,

It Is Hereby Ordered That the motion of A. J. Goerig and Clyde Philp for a new trial and the motion of the Continental Casualty Company for a new trial, and each of them, be and the same are hereby denied.

Done in open court this 20th day of May, 1947.

/s/ SAM M. DRIVER,
Judge.

Presented by:

/s/ HARRY L. OLSON,
Of Attorneys for Plaintiff.

[Endorsed]: Filed May 20, 1947. (87)

EXHIBIT Q

In the United States Circuit Court of Appeals
for the Ninth District

No. 11707

CONTINENTAL CASUALTY COMPANY, a
Corporation,

Defendant and Appellant,

vs.

THE UNITED STATES OF AMERICA, for the
Use of M. C. SCHAEFER, an Individual Do-
ing Business as CONCRETE CONSTRUC-
TION COMPANY,

Plaintiff and Appellee.

A. J. GOERIG and CLYDE PHILP, Individuals
and Co-Partners,

Defendants and Cross-Appellants,

SAM MACRI, DON MACRI and JOE MACRI,
Individuals and Co-Partners,

Defendants and Cross-Appellants.

MOTION TO DISMISS APPEAL OF
CROSS-APPELLANTS MACRI

Comes now the Appellee, M. C. Schaefer, an in-
dividual, doing business as Concrete Construction
Company, and moves the above-entitled Court for
the following order:

1.

That an order be entered, dismissing the appeal

of the Defendants and Cross-Appellants, Sam Macri, Don Macri and Joe Macri, individuals and co-partners; this motion to dismiss is made upon the grounds and for the reason that said Defendants and Cross-Appellants failed to serve and file their notice of appeal timely, as required by 18 U.S.C.A., Section 230, and is based upon the transcript of the record, heretofore filed in this Court, and upon the affidavit of Harry L. Olson, hereto attached and made a part of this motion.

2.

The facts, objects and points, concerning this motion to dismiss, are as follows: That upon the 1st day of May, 1947, Findings of Fact, Conclusions of Law and Judgment were entered in said case, and no motion for a new trial was ever made, for or on behalf of the said Defendants and Cross-Appellants Macri; that on the 9th day of May, 1947, Defendant and Appellant, Continental Casualty Company, interposed a motion for a new trial; that on the 12th day of May, 1947, Defendant and Cross-Appellants, A. J. Goerig and Clyde Philp, interposed a motion for a new trial; that thereafter, on the 20th day of May, 1947, an order denying both of the above motions for a new trial was entered by the District Court; that upon the 16th day of August, 1947, the Defendants and Cross-Appellants Macri served and filed their notice of appeal to the above-entitled Court. That said notice of appeal was served and filed 110 days after the entry of said Judgment, and that Appellants Macri, not having

interposed a motion for a new trial, it is the position of the Appellee herein, that the time for appeal, as for the Cross-Appellants Macri, began to run upon the entry of the Judgment, and was not suspended by the motions for a new trial, interposed by the other Defendants herein.

3.

An authority for the position of the Appellee that the notice of appeal of the Cross-Appellants Macri was not timely, Appellee cites the following authorities: Denholm and McKay Company vs. Collector of Internal Revenue, 132 Fed. (2D) 243; Alexander vs. Special School District of Boonville, 132 Fed. (2D) 355; Tinkoff vs. West Publishing Company, 138 Fed. (2D) 607; Bowles vs. Rice, 152 Fed. (2D) 543; Morrow vs. Wood, 126 Fed. (2D) 1021; Safeway Stores, Inc., vs. Coe, 136 Fed (2D) 771; 26 U.S.C.A. 230.

Dated this day of December, 1947.

HARRY L. OLSON,

FRED C. PALMER,

Attorneys for Appellee,

M. C. Schaefer.

AFFIDAVIT OF HARRY L. OLSON

State of Washington,
County of Yakima—ss.

Harry L. Olson, being first duly sworn, on oath deposes and states:

That he is one of the attorneys for Appellee, M. C. Schaefer, doing business as Concrete Construction Company, and makes this affidavit in support of the motion to dismiss the appeal of Defendants and Cross-Appellants, Sam Macri, Don Macri and Joe Macri, individuals and co-partners; that the Judgment, Findings of Fact and Conclusions of Law in the above-entitled case were signed by the Court and entered upon May 1st, 1947; that no motion for a new trial was ever made for or on behalf of the Defendants and Cross-Appellants Macri; that the Continental Casualty Company served and filed a motion for a new trial upon the 9th day of May, 1947; that A. J. Goerig and Clyde Philp served and filed a motion for a new trial on May 12th, 1947; that the District Court signed and entered an order denying said motions for a new trial, interposed by the Appellants, Continental Casualty Company, and Cross-Appellants, A. J. Goerig and Clyde Philp, on May 20th, 1947; that the Cross-Appellants Macri served and filed their notice of appeal to the Circuit Court of Appeals on August 16th, 1947.

HARRY L. OLSON.

Subscribed and Sworn to before me this day
of January, 1948.

.....,

Notary Public for Washing-
ton, Residing at Yakima.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11,707

CONTINENTAL CASUALTY COMPANY, a
Corporation,

Defendant and Appellant,

vs.

THE UNITED STATES OF AMERICA, for the
Use of M. C. SCHAEFER, an Individual
Doing Business as CONCRETE CONSTRUCTION COMPANY,

Plaintiff and Appellee.

A. J. GOERIG and CLYDE PHILP, Individuals
and Co-Partners,

Defendants and Cross-Appellants,

SAM MACRI, DON MACRI and JOE MACRI,
Individuals and Co-Partners,

Defendants and Cross-Appellants.

March 31, 1948

Upon Appeals from the District Court of the
United States for the Eastern District of
Washington, Southern Division

Upon motion to dismiss appeal of Macri, et al.

Before: Denman, Healy and Bone,
Circuit Judges.

Denman, Circuit Judge:

The United States, as use plaintiff for one Schaefer, sued Sam Macri, Don Macri, Joe Macri, A. J. Goerig, and Clyde Philp, individuals and co-partners doing business as Macri Company, and Continental Casualty Company, a corporation, upon a claimed non-performance of contract between the United States and Defendants Macri Company for earthwork, pipelines and structures, laterals 59.3 to 69.8 and sublaterals Roza Division, Yakima Project, Washington, wherein and whereby said defendant contractors contracted to furnish materials and perform work in accordance with the terms of said contract for the sum of \$128,550.95. The Continental Casualty Company was joined as surety for the Macri Company's performance of the contract. Judgment on this contract was entered against the three Macris and the Continental Casualty Company jointly and against each of them.

The complaint also alleged non-performance of a subcontract of the Macris' Company on the same job. Judgment was entered against them alone on this count. The complaint against the other two partners was dismissed.

The Continental Casualty Company claimed against the three Macris on their contract to hold it harmless on its surety bond. Judgment was entered against the Macris for the amount the Continental Casualty Company was held liable to the plaintiff and for its attorneys' fees. This judgment was not made conditional on the non-payment of the judgment by the Macris.

The three Macris also cross-complained against the plaintiff. Judgment was entered dismissing the cross-complaint. The three Macris also cross-complained against Goerig and Philp. Judgment was entered dismissing this cross-complaint. Goerig and Philp cross-complained against the three Macris. Judgment was entered dismissing this complaint. All the judgments were entered on May 1, 1947.

The Continental Casualty Company and Goerig and Philp moved for a new trial. The three Macris did not join in the motion. The motions for a new trial were denied on May 20, 1947. The Continental Casualty Company and Goerig and Philp appealed within three months after May 1, 1947. The Macris delayed their appeal until August 18, 1947, more than three months after the entry of the judgments against them, but within three months after the denials of the motions for new trial, in which they did not join.

Schaefer, for whom the United States sues, but not the United States the use plaintiff, moves to dismiss the Macris' appeal on the ground of absence of jurisdiction. There is no motion on behalf of the others having judgment. However, since the question is one of jurisdiction, we must proceed to consider it, even though there may be no moving party.

As to the judgments against the three Macris on their cross-complaints, it is apparent their appeal must be dismissed. They made no motion for a new trial as to these judgments, and that of Goerig and Philp was of adversary parties and could not be

construed as on behalf of the Macris. So also of the judgment for the United States on the second count against the Macris alone. The statute was not tolled as to it.

The joint and several judgment on the count in favor of the United States and against the Macris and their surety and that in favor of the Continental Casualty Company against the Macris on their agreement to hold it harmless present a different question. It is contended that since there might have been a granting of the motion for a new trial in favor of the Continental Casualty Company, the Macris' surety, which would dispose of the same issue as that decided against the judgment debtors Macris, co-jointly and with their surety, the pendency of the motions for a new trial by one of such debtors tolled the time for appeal as to all of them.

The Macris cite *Brockett, et al., vs. Brockett*, 2 Howard 238, 240, the leading case of the judge-made law that the pendency of a motion to modify a decree or for a new trial tolls the statutory time for appeal.* However, the opinion there states that the petition to have opened the decree, the consideration of which tolled the statute, was by the losing "defendants" (plural). The title of the case, with *Brockett, et al.*, as appellants, as well shows the petition was not by one of them appealing alone.

More relevant is *Zimmerman vs. United States*,

*Now embodied in F.R.C.P. 73(a) effective March 19, 1948.

298 U.S. 167, where the judge sua sponte, extended the time to do all things connected with the decree because "it will be necessary to modify and amend the said decree." There the Supreme Court reasoned that since none of the defendants decreed against could know how the amendment would affect him, the statute was tolled as to all. Cf. *Leishman vs. Associated Electric Co.*, 318 U.S. 203, 205.

It is apparent that if the motion for the new trial were granted to the surety of the Macris, it would be on grounds that in justice would require a similar relief for the Macris against the judgment on the first count in favor of the United States and also that against them and in favor of the surety. If the trial court on the motion of the surety had the power to set aside these two judgments, the Macris could not know until the surety's motion were decided whether the judgments were final as to them. That is to say, they would be in the situation of the parties in the Zimmerman case.

The question, then, is could the trial court under Rule 59(a) of the Federal Rules of Civil Procedure have granted a new trial to the Macris on their judgment on the motion of their surety. As to judge-tried cases, Rule 59(a) provides:

"(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues. * * * (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United

States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.”

It is not a strained interpretation of the language of the first sentence of the rule that a motion of a surety to “open,” that is, set aside, a joint and several judgment against it and its three principals empowers the court to set it aside as to all four of them. We have held that those rules must be liberally construed. *Phillips vs. Baker* 121 Fed. (2d) 752, 754; *Pierkowskie vs. New York Life Ins. Co.*, 147 Fed. (2d) 928, 933 (C.C.A. 3); *Fakouri vs. Cadais*, 147 Fed. (2d) 667, 669.

An analogy to such an interpretation of power in the district court is the power of the appellate court on an appeal taken by but one party on an issue which, if resolved in his favor, will likewise affect another party, to reverse the judgment as to such non-appealing party. *In re Barnett*, 124 Fed. 1005, 1009 and state cases cited: *Maryland Casualty Co. vs. City of South Norfolk*, 54 Fed. (2d) 1032, 1039; c.f. *Washington Gas Light Co. vs. Lansden* 172 U.S. 534, 555.

Since it is our view that the motion for a new trial by their surety tolled the statute for the Macris, on their appeals from the judgment on the first count of the complaint of the United States and

the judgment in favor of Continental Casualty Company, we hold they conferred jurisdiction here. As to the other appeals of the Macris, we order entered a judgment of dismissal as to them.

[Endorsed]: Opinion upon motion to dismiss appeal of Macri, et al. Filed Mar. 31, 1948. Paul P. O'Brien, Clerk.

EXHIBIT R

United States Court of Appeals
for the Ninth Circuit

CONTINENTAL CASUALTY COMPANY, a Corporation,

vs.

M. C. SCHAEFER, etc., et al.

Excerpt from Proceedings of Tuesday, October 19, 1948.

Before: Denman, Chief Judge, and Healy and Bone,
Circuit Judges.

ORDER OF SUBMISSION

Ordered appeals herein argued by Mr. Elwood Hutcheson, counsel for appellant, Continental Casualty Company, and by Mr. Tom W. Holman, counsel for appellants, Macri, et al., and by Messrs. Stuart W. Hill and Harry L. Olson, counsel for appellee, Schaefer, and submitted to the court for consideration and decision.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, February
11, 1949.

Before: Denman, Chief Judge; Bone and Orr,
Circuit Judges.

ORDER DIRECTING FILING OF OPINION
AND FILING AND RECORDING OF
JUDGMENT

Ordered that the typewritten opinion this day
rendered by this court in above cause be forthwith
filed by the clerk, and that a judgment be filed and
recorded in the minutes of this court in accordance
with the opinion rendered.

In the United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Appeals from the District Court of the United States
for the Eastern District of Washington South-
ern Division

Before: Denman, Chief Judge; Healy and Bone,
Circuit Judges.

Denman, Chief Judge:

OPINION

The several Macris, hereafter so called, contrac-
tors on a government contract under the Miller Act,
appeal from a judgment in favor of Schaefer, their

sub-contractor, for labor and materials furnished in the performance of a subcontract and modification thereof.

Continental Casualty Company, hereafter called Continental, appeals from a judgment against it as surety on the contract between the Macris and the United States, described *infra*, in favor of Schaefer for the amount of the judgment against the Macris.

The Macris do not contend that they are not liable for an unpaid balance on the contract price included in the judgment, but contend they are not liable for more than the contract price. They contend that the evidence does not support the court's findings that they breached the subcontract and, on the contrary, that the extra work done by Schaefer was in the performance of that contract. Continental's appeal urges these grounds and, in addition, that in any event a surety under the Miller Act is not liable for more than the value of the labor and materials to be supplied under the contract. Continental also seeks to recover here additional attorney's fees for prosecuting this appeal. The dispute between Schaefer and the Macris arises out of the performance of a subcontract to do the cement work on the federal irrigation project known as the Roza Division, Yakima Project, near Yakima, Washington. Schaefer sued to recover \$57,618.87 as the alleged unpaid balance of the reasonable value of the work, labor and expenses on a quantum meruit theory after the alleged breach of a contract by the Macris. The subcontract between Schaefer and the Macris provided that Schaefer was to furnish all

labor and necessary equipment to do all of the concrete work, form work, cut, bend and install all reinforcing steel, all such work as shown on the plans as specified (in certain numbered specifications).

The trial court, sitting without a jury, found that the Macris were to perform all of the excavating and to furnish all of the materials necessary for the performance of the subcontract with the exception of form wire, nails and curing materials. The excavating and materials were to be furnished in accordance with specifications and in proper time for the performance of the subcontract by Schaefer. The court further found that Schaefer's performance was diligent, but that the Macris had breached the subcontract in that they failed to make the excavations in the proper manner so that Schaefer's carpenters had to make extra excavations in order to install the forms. The Macris also failed to do the fine grading in the proper manner and in time for Schaefer to proceed with prompt progress of the work. The Macris also failed to furnish the proper quality and quantity of lumber required, which hindered and delayed Schaefer in the performance of his work. Macris' breaches were found wilful and negligent and they continued and persisted throughout the entire performance of the subcontract.

The court further found that Schaefer had made many complaints to the Macris regarding the latter's defaults; that the Macris induced Schaefer to continue performance and to perform some of the work the Macris were to do, and that Schaefer

would be compensated for the additional expense because of the adverse conditions created by the Macris. The court found that "there was an implied agreement or quasi-contract that * * * Schaefer was to be paid the fair and reasonable value of his subcontract under the conditions and with the extra burdens imposed upon (Schaefer by the Macris' breaches)."

The subcontract contained a provision that in order to obtain extra compensation, written notices and statements were required. The court found that the Macris had waived this provision by their conduct toward Schaefer by accepting and acting upon the oral notices given.

Judgment was rendered in favor of Schaefer against the Macris and Continental for \$56,764.97, with interest from date of judgment. Also, a judgment in that same amount was rendered in favor of Continental against the Macris, plus \$1750 for Continental's attorneys' fees. Continental and the Macris both appeal from the judgments, and Continental asks for additional attorneys' fees from the Macris to cover the prosecution of this appeal.

A. The law governing the several issues.

On the issue of the Macris' liability to Schaefer, we think that the Washington law should govern. While federal jurisdiction is conferred by the Miller Act and not by diversity of citizenship, we feel that the reasons underlying the doctrine of *Erie Ry. Co. v. Tomkins*, 304 U. S. 64, are applicable here, where the issue does not involve construction

or application of a federal statute. *Blair v. United States*, 147 F. 2d 840, 849 (Cir. 8). Cf. *Goerig v. Continental Casualty Co.*, 167 F. 2d 930 (Cir. 9). The rights and liabilities of the parties under the subcontract should not depend on the choice of forum sought to enforce these rights. Cf. *Guaranty Trust Co. v. York*, 326 U. S. 99, 109. Hence we should decide this issue as would a state court sitting in Washington. Since all the relevant facts regarding this subcontract have occurred in Washington, the Washington substantive law of contracts is applicable. *Hatcher v. Idaho Gold and Ruby Mining Co.*, 106 Wash. 108, 113, 179 P. 106.

On the issue of Continental's liability on the payment bond, the federal law should control because the determination of the extent of the liability involves the construction of a federal statute, the Miller Act, under which it was created *Liebman v. United States*, 153 F. 2d 350 (Cir. 9).

B. Macris' Liability to Schaefer.

The district court held that there was an "implied agreement or quasi-contract" to the effect that the Macris would pay Schaefer the fair and reasonable value of his subcontract under the conditions and with the extra burdens imposed upon Schaefer by the Macris' breach and failure to perform their part of the subcontract. The Macris claim there is no substantial evidence to support the finding that they breached the subcontract. While the testimony is conflicting, the record contains sufficient evidence to support the finding, and this court will

not weigh the evidence in such a case. F.R.C.P. Rule 52 (a). We cannot say that this finding is clearly erroneous.

Since the court found that the subcontract was wilfully breached by the Macris and that they induced Schaefer to continue performance and even to perform part of the Macris' work, Schaefer should be allowed to recover in excess of the stipulated contract price for the extra work performed in reliance on the Macris' statements which were intended to induce reliance. *Olwell v. Nye and Nisson Co.*, 26 Wash. 2d 282. Whether the theory is called implied-in-fact contract, quasi-contract or promissory estoppel, the measure of Schaefer's recovery against the Macris should be the reasonable value of the work and materials furnished plus overhead and profit. *Nelson v. City of Seattle*, 180 Wash. 1, 28, 38 P. 2d 1034. Cf. *United States v. Zara Contracting Co.*, 146 F. 2d 606 (Cir. 2); 5 Williston, *Contracts* (Rev. Ed.) §1480.

The Macris contend that Schaefer may not recover for the extra work because he has not complied with the contract provisions regarding written notice of changes in order to get extra compensation. The trial court found that the Macris had waived these provisions by accepting and acting on the oral notices, and there is ample evidence to support such a finding. Such a provision does not deprive the parties of the power to modify the contract without a writing, *Richie v. State*, 39 Wash. 95, 81 P. 79.

The Macris rely on *City and County of San Francisco v. Transbay Construction Co.*, 134 F. 2d

468 (Cir. 9). That case is not applicable here because it was a diversity case in which this court expressly applied California law to determine the rights of the parties under the contract. Furthermore, that case is distinguishable in that the nature of the claim, although on the theory of quantum meruit, was really for damages for delay, and the plaintiff there had failed to comply with provisions of the City's charter relating to filing such claims within sixty days. Also, there the alleged extra work done was that which the plaintiff contracted to do, but it had become more burdensome due to unanticipated conditions. The City had held out no added inducement to the contractor to continue performance, and did not, by implication or otherwise, agree to pay the contractor anything beyond the amount fixed in the written agreement. In the instant case, no statute limits the Macris' liability for breaches of the subcontract, and also Schaefer has performed work at the Macris' request which was not called for by the subcontract. We hold the Macris liable for the extra work performed at their request.

C. Method of Ascertaining the Amount of Recovery.

Macris contend that Schaefer should not recover because he has failed to prove the increased cost of the work because of Macris' defaults. Schaefer introduced a statement of costs prepared by a certified public accountant which showed all Schaefer's costs on this project. From this amount was subtracted the amount the Macris had paid on account

and judgment was rendered for the difference. There was evidence to show what Schaefer's costs would have been if the work had progressed as originally contemplated, and this amount was substantially the same as the amount of Schaefer's bid, so the increased costs of Schaefer were properly computed by reference to this statement. In the light of this evidence we cannot say that the finding of the trial court was erroneous. The judgment in favor of Schaefer against the Macris is affirmed.

D. Continental's Liability to Schaefer.

Section 1 of the Miller Act, 40 U.S.C. §270 (a), provides that the contractor with the government shall furnish "a payment bond * * * for the protection of all persons supplying labor and material in the prosecution of work provided for in said contract for the use of each such person." Section 2, 40 U.S.C. §270 (b), provides that "every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefore * * * shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit * * *."

Continental contends that Schaefer's cause of action is for damages for breach of the subcontract by the Macris, and that a surety under the Miller Act is not liable for such damages. *United States v. Maryland Casualty Co.*, 147 F. 2d 423 (Cir. 5);

L. P. Friestedt Co. v. United States Fire Proofing Co., 125 F. 2d 1010 (Cir. 10). These cases are distinguishable from the instant case in that there was no agreement there by the general contractor or the United States to pay any additional amount for the extra work done. Here the court below found, "That pursuant to said subcontract * * * and pursuant to the oral conversations, representations and inducements herein referred to, (Schaefer) between the 14th day of March, 1944, and the first day of May, 1945, furnished labor and materials and performed services for the (Macris) at their special instance and request of the reasonable cost and value of \$89,498.71." From this amount was deducted the amount the Macris paid on account, which left a balance of \$56,764.97, the amount of the judgment. It does not appear from this finding that the amount of the judgment included damages for breach of contract.

In the Friestedt case, *supra*, at page 1012, the court said, "There is here no claim that they (the subcontractors) furnished any extras necessary for the completion of the contract and therefore contemplated by the parties and implied in the contract * * * What was done was not required by any of the terms of the contract but became necessary because of an alleged breach of the contract because a contractor violated one of the terms of the contract; * * *" Here the new agreement between the Macris and Schaefer contemplated that Schaefer was to perform extra work, which the Macris were originally obligated to perform, in order that the

main contract between the Macris and the United States could be performed. The performance of the new agreement furnished labor and materials agreed by the Macris to be supplied under the main contract and hence labor and materials within the terms of the Miller Act and the bond. Cf. *John A. Johnson & Sons v. United States*, 153 F. 2d 534 (Cir. 4). The judgment against Continental is affirmed.

E. Attorneys' fees for Continental's Appeal.

The trial court awarded Continental \$1750 for attorneys' fees in that court. Continental now seeks to recover in this court fees for the prosecution of this appeal, pursuant to a provision in the application for the bond which required the Macris "to indemnify the company (Continental) against all loss, costs, damages, expenses and attorneys' fees whatever, and any and all kinds of liability therefor, sustained or incurred by the company * * * in prosecuting or defending any action brought in connection (with the bond.)" There is also a provision "that separate suits may be brought hereunder as causes of action accrue" without prejudice to other suits regardless of when the cause of action arises.

No cause of action had accrued for the attorneys' services in this court when the case was pending in the district court. Whatever right the parties may have for this more recent cause of action should be instituted in a court of first instance. It is an original proceeding which cannot be initiated here.

In the three cases cited by Continental: *American*

Can Co. v. Lodoga Canning Co., 44 F. 2d 766 (Cir. 7); Davis v. Parrington, 281 Fed. 10 (Cir. 9) and Rigopoulous v. Kervan, 140 F. 2d 506 (Cir. 2), the statutes involved created in the appellate court the right there to recover attorneys' fees.

The judgment of Schaefer against the Macris and Continental is affirmed. The petition for allowance of attorneys' fees is dismissed, without prejudice.

[Endorsed]: Opinion. Filed Feb. 11, 1949. Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit
No. 11707

CONTINENTAL CASUALTY COMPANY

vs.

M. C. SCHAEFER, etc.

A. J. GOERIG and CLYDE PHILP

vs.

CONTINENTAL CASUALTY COMPANY.

SAM MACRI, et al.,

vs.

M. C. SCHAEFER, etc.

JUDGMENT

Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Eastern District of Washington, Southern Division, and on petition of Continental Casualty Company for allowance of attorneys' fees on the appeal and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by the Court that the judgment of the said District Court in this cause be, and hereby is affirmed, and that the petition of Continental Casualty Company for allowance of attorneys' fees on the appeal be, and hereby is denied.

[Endorsed]: Filed and entered Feb. 11, 1949.
Paul P. O'Brien, Clerk.

EXHIBIT S

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, April 5,
1949.

Before: Denman, Chief Judge; Healy and Bone,
Circuit Judges.

ORDER DENYING PETITIONS FOR REHEARING

Upon consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant, Continental Casualty Co., filed March 7, 1949, and the petition of appellants, Macri, et al., filed March 10, 1949, both within time allowed therefor by rule of court, for a rehearing of above cause be, and each of them hereby is denied.

United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF CLERK, U. S. COURT OF
APPEALS FOR THE NINTH CIRCUIT,
TO RECORD CERTIFIED UNDER RULE
38 OF THE REVISED RULES OF THE
SUPREME COURT OF THE UNITED
STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing six volumes, containing two thousand two hundred and seventy-five (2,275) pages, numbered from and including 1 to and including 2,275, to be a full, true and correct copy of the entire record together with original documentary exhibits transmitted herewith of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, Continental Casualty Co., and the appellants, Macri, et al., and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 25th day of April, 1949.

[Seal]

PAUL P. O'BRIEN,
Clerk.

EXHIBIT T

United States Circuit Court of Appeals
for the Ninth Circuit
No. 11707

CONTINENTAL CASUALTY COMPANY,
Appellant,

vs.

M. C. SCHAEFER, etc.,
Appellee.

ORDER STAYING ISSUANCE
OF MANDATE

Upon application of Elwood Hutcheson, Esq., counsel for the appellant, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 28 of the mandate of this Court in the above cause be, and hereby is stayed, pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the appellant herein, providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before May 16, 1949. In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

WILLIAM DENMAN,
United States Circuit Judge.

Dated San Francisco, Calif., April 5, 1949.

[Endorsed]: Filed April 5, 1949. Paul P.
O'Brien, Clerk.

EXHIBIT U

August 8, 1950.

Brethorst, Holman, Fowler & Dewar,
Attorneys at Law,
17th Floor, Hoge Building,
Seattle 4, Washington.

Attention: A. T. Bateman.

Re: Schaefer v. Macri, et al.

Gentlemen:

I have your letter of August third enclosing original and copy of proposed order in connection with the Macris' cost bond and I am unable to approve the same for two reasons:

First: I at one time examined the bonds filed in connection with the appeal and I recall that at least one of the bonds was conditioned upon payment of any damages caused by any delay resulting from the appeal. Mr. Schaefer asserts that these damages are substantial and contemplated instituting suit for the same.

In the second place, when the Continental Casualty Company paid the judgment in connection with this case they took an assignment of the judgment to them and when I called Mr. Hutcheson, who represents the Bonding Company, he was also opposed to my approving the order.

Yours truly,

HARRY L. OLSON.

HLO:re

EXHIBIT V

Conversation with Mr. McKelvy August 16, 1950
From 1:30 to Approx. 2:35 P.M.

After saying hello to one another, he asked: "How is business?" I said: "Nothing to brag about." He said: "I thought it would be good." I said: "No, you see, we are still in the concrete subcontracting game instead of doing general contract work because of the lack of money due to the heavy expense of the suit, and aside of that, we are not able to make bond on any work." Mr. McKelvy said: "This statement came up and I told the girl at the office that I would take it along and see what I could do with it." I asked him into a rear office, and then told him that I was not thinking about it at present, and that I was going to start a damage suit to find out whether or not a bonding company and others could give us such a run-around. He then said: "Well, I don't see where that affects this account. Now if it is too much, why you set the amount and let's get it cleaned up. In any event we will not sue you as the statute of limitations has run on it." I then said: "As far as an account being outlawed by time doesn't make any difference to me. If an account is just, I will pay it anyway, regardless of the time." He said: "Well, I would, too, and on this I think we earned it. Apparently you don't think so." I said: "Well, I want to see what the score really is. I've gotten the run-around for a long time and I would like to find out why I was led right up to the brink where I only had

about a month left to file our suit, and at that time at that meeting at your office I was pushing you to get the suit filed, then you said—‘We can’t represent you in a suit against Continental Casualty Co. as Continental Casualty Company is one of our largest accounts.’ I then asked you how much time I yet had before the deadline, and you said—‘About a month.’ ” Mr. McKelvy then said: “We did not know before that time that Continental Casualty Company would be involved in a suit or we would not have taken your account. If it were the money we were after and thought Continental Casualty Company would become involved, we would not have taken your case in the first place. As it was, they asked us to represent them, but we turned them down.” I then said: “Now, that would have been nice if you would have agreed to represent them after having represented me, wouldn’t it?” McKelvy then said: “I don’t like your implying that we are crooked. We have been in business and had a good reputation since before the turn of the century.” I said: “I didn’t make that statement. I am just relating what has happened that I don’t like. Now, wouldn’t it have been much better if you had informed me the first time that I was in your office that you couldn’t represent me as Continental Casualty Company was one of your largest accounts instead of leading me right up to the brink where, if I had not been on my toes, I would have lost my right to sue.” McKelvy said: “Yes, but our hindsight is now much better than our foresight and we did not believe

that Continental Casualty Company would be involved." I said: "Nevertheless, they were Macri's Bonding Company and you knew it." And then I also said: "Then you remember the time you told me as you and I were walking up the street that I couldn't collect from Macri as he had all his assets hidden, that the chances of holding Continental were very slim, and told me to turn my business and anything of value over to brother Bill, a brother-in-law or someone I could trust and thereby get rid of the account with Uncle Sam and all other old accounts. And how you handled an account for a local contractor and the Bank in that case lost approximately \$83,000.00 and you got their release on it and that the contractor is still doing business. I told you then that my road was a straight road, probably long and rough as hell, and that's the only road I'm traveling and if it busts me up that is still the way it's going to be done. You remember that, do you?" Mr. McKelvy said: "Yes, I do." I said: "And how when you showed me young Macri's picture and told me that—'This is just a coverup of Macris' assets. Everyone knows the kid didn't do it, but he has had his day in court and that's a closed book.' You remember that, don't you?" Mr. McKelvy said: "Yes, I do." I said: "Then after they had Macris' assets hidden, they came up with a termination agreement to protect Philp & Goerig, and that damn thing is predated ahead of our pouring concrete or dated the middle of July. Now isn't that something?" McKelvy said: "I think you may have that about

right.” I said: “I just want to find out if a bonding company can do this on two different jobs. First, on a job where the General Contractor goes broke before the job is completed, the bonding company takes over, submits statements to the school board, as an example, receives payment on same, receives statements from subcontractors and material companies and pays them. In this way they are filling the shoes of the General Contractor where the public is concerned or the public officials are concerned or they would soon be out of business. But take the second job where the general contractor completes the job there is no general public concerned and they just tell the subcontractors and material men to go to hell or in effect just as much. Then we have to spend \$40,000.00 to \$50,000.00 to collect \$57,000.00 plus interest from date of judgment. I am getting suit ready now.” McKelvy said: “That will take another 10 to 15 years.” I said: “I don’t care. I’ll still have six years left. I owe it to my conscience, my men, and to other sub-contractors to clear such a situation up.” Then I said: “And what about the meeting that I had with you at your office at about 11:30 a.m. and we only greeted one another and had a few words but did not get into our subject, when you told me that you had a luncheon speaking engagement and would meet me back at your office at 1:15 p.m. This was the arrangement when we walked out of your office. I was back to your office a little before one. The outer office girl asked if I were waiting for you. I said ‘Yes.’ and she said, ‘Mr.

McKelvy isn't going to be in any more today.' I said, 'Yes, he is to be back at 1:15—that was our arrangement just before lunch.' 'I will wait.' Then approximately at 1:20 she said: 'I really don't think he will be back as he is going out to his new home.' I asked what the telephone number was; and she said, 'I don't know, he has no telephone out there yet.' I asked what the address was; and she said, 'I don't know.' I asked if there wasn't someone in the office that did; and she said, 'I am sure there isn't.' I waited until about 3:30 then came home. It was about that time that I was really putting on the pressure to get the suit started." Mr. McKelvy said: "I don't remember that I ever had such an appointment with you and let you sit. I don't deny it, but we just don't do business like that." I said: "At that first meeting in your office after I told you of my gripe, you had Mr. Skeel in and told him the story. Mr. Skeel said, 'Well, you can't hold the Casualty Company—and only Macri, if you have absolute segregated costs as this is in the contract and that is not.' " Now, I said: "That's impossible in a situation like this. Now why didn't you or Mr. Skeel inform me at that time that Continental Casualty was an account of yours?" Mr. McKelvy said: "Well, we didn't think they would be involved." I said: "No, you thought that we would sue as many others did in the past and let it be called damages and we would lose our case." Mr. McKelvy said: "Well, I advised you to get Olson and he did you a good job, didn't he?" I said: "Yes, you gave us the name of about four attorneys

and we selected Olson and that was on my question of a good attorney in Yakima.” McKelvy said: “I spent some time on the phone with Mr. Olson. I called Mr. Olson twice and I also have some copies of letters in my files that I wrote to Olson telling him to watch out so that it would not be called damages.” I said: “You did!—You ask Olson who told him at the first and second meetings not to use the word damage, that we were suing for cost, and I told him at the third meeting after he used the word that if he were going to use it again it meant only one thing to me, that I would have to get another attorney. That he shouldn’t even think the word in connection with this suit. A suit in damages may come later, this has to be in Quantum Meruit.” Mr. McKelvy said: “Well, I would like to get this account off the books, so I’ll leave it up to you. You pay me what you want to and we’ll call the account paid. I just want something so we can close our books.” I said: “I’m not doing anything about it.” Mr. McKelvy said: “Well, if that’s it, we’ll just have to write it off and forget about it then.” (He then left our office.)

[Endorsed]: Filed June 15, 1951.

[Title of District Court and Cause.]

DEMAND OF PLAINTIFF FOR JURY TRIAL

Comes now the plaintiff, and demands a trial by jury of all the issues involved in this cause, said issues being more particularly disclosed by the Seconded Amended Complaint on file herein.

Dated this 15th day of June, 1951.

/s/ M. C. SCHAEFER,
Plaintiff.

State of
County of.....—ss.

Service of the within Demand of Plaintiff for Jury Trial is hereby accepted this day of 1951.

.....

[Endorsed]: Filed June 15, 1951.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now W. R. McKelvy, one of the defendants above named, and moves the court for an order to dismiss the action against this defendant for the following reasons:

1. The second amended complaint fails to state a claim against this defendant upon which relief can be granted.

2. The cause, if any, is barred by the statute of limitations. That more than two years has expired since the commencement of any cause of action based upon conspiracy and more than three years has expired since the commencement of any cause of action against this defendant.

3. There is a misjoinder of parties defendant.

4. There is a misjoinder of causes of action.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

/s/ W. PAUL UHLMANN,

/s/ A. P. CURRY,

Attorneys for Defendant,
W. R. McKelvy.

Receipt of Copies acknowledged.

[Endorsed]: Filed June 21, 1951.

[Title of District Court and Cause.]

MOTION TO DISMISS

The defendant, Continental Casualty Company, a corporation, moves the court to dismiss the action against Continental Casualty Company, a corporation for the following reasons:

1. The Second Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

2. The action is barred by the statute of limitations.

/s/ CARL E. CROSON,

/s/ WILLARD HATCH.

NOTICE OF MOTION

To M. C. Schaefer, Plaintiff.

Please take notice that the undersigned will bring the above Motion on for hearing before this Court at Room, United States Courthouse, Seattle, Washington, on the day of, 1951, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

/s/ CARL E. CROSON,

/s/ WILLARD HATCH.

Receipt of Copies acknowledged.

[Endorsed]: Filed June 25, 1951.

M. C. SCHAEFER STATEMENT RE JUDGE ASSIGNMENT

Your Honor I will be happy if you will assign this case to a judge who has a philosophy of life that is coupled with a desire to help make this world a little better place to live for those who come after him and who has not at any time worked for, or done post graduate work in the office of, or has had mutual business relations with any of the defendants, their attorneys or others having an interest in this case.

I am also very interested that this judge then have ample opportunity to peruse the complete file in this case, before this motion again comes on for hearing.

/s/ M. C. SCHAEFER,
Plaintiff.

[Endorsed]: Filed July 2, 1951.

[Title of District Court and Cause.]

MOTION TO DISMISS

The defendants, Sam Macri, Don Macri and Joe Macri, individuals, move the court to dismiss the action against them for the following reasons:

1. The Second Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

2. The action is barred by the statute of limitations.

/s/ GRANVILLE EGAN.

NOTICE OF MOTION

To M. C. Schaefer, Plaintiff.

Please take notice that the undersigned will bring the above Motion on for hearing before this Court at Room, United States Courthouse, Seattle, Washington, on the day of, 1951,

at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

/s/ GRANVILLE EGAN.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 5, 1951.

In the District Court of the United States for the
Western District of Washington, Northern
Division

Number 2673

M. C. SCHAEFER, an Individual,
Plaintiff,

vs.

SAM MACRI, DON MACRI, and JOE MACRI,
Individuals; and W. R. McKELVY; and CON-
TINENTAL CASUALTY COMPANY, a Cor-
poration,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Before: The Honorable William J. Lindberg,
United States District Judge.

July 2, 1951—2:00 P.M.

Appearances:

M. C. SCHAEFER, The Plaintiff,
Appeared on behalf of Plaintiff.

GRANVILLE EGAN, ESQ.,

Appeared on behalf of Sam Macri, Don
Macri and Joe Macri, Defendants.

WILLARD HATCH ESQ., of

KUMM, HATCH and COOK,

Appeared on behalf of W. R. McKelvy and
Continental Casualty Company, Defendants.

Whereupon, the following proceedings were had,
to wit: [2*]

The Clerk: Do you have a matter?

Mr. Egan: A motion. It is a motion made by
Mr. Hatch's group and which I wish to join in
orally, if I may.

Mr. Hatch: The motion is one that we have used
before. You have probably had a brief look at the
file but it is so voluminous that I better start at the
beginning.

The Court: I might say it came in after my
lunch hour.

Mr. Hatch: I wouldn't expect you to get much
out of it in an hour. It is a civil conspiracy action
against the three Macris, W. R. McKelvy, an attorney
in Seattle, and Continental Casualty Company,
and Clyde Philp and A. J. Goerig who have not
appeared.

It is brought by Mr. Schaefer pro se and he has
no attorney representing him and hasn't had in
these proceedings.

* Page numbering appearing at top of page of original Reporter's
Transcript of Record.

At the time of the first Complaint we brought forth a motion to dismiss the action and at that time Judge Bowen expressed a desire not to handle the case and transferred it to Judge Lemon of Sacramento and he heard the motion to dismiss, which was granted.

An amended complaint was filed and motions to dismiss were served and filed and, not having a judge, we noted the motions before Judge Bowen asking that the motions be assigned to some judge.

They were assigned to Judge Sam Driver and he heard them and dismissed it and a second amended complaint was filed and now we do not have a judge and we are now hoping that it will be [3] assigned to your Honor. Up to now we have been floating around with visiting judges.

We are not ready to argue today. The case has been referred to your Honor, subject to your approval, and if you refuse the case I assume it will have to go to Judge Bowen for assignment. It is a jury action and I can not see why your Honor would be unwilling to take the case and I would be delighted to have you do it.

If you do, it will be necessary to have you hear the motions to dismiss on behalf of McKelvy and Continental Casualty Company. They are on file, or will be, this afternoon.

That is the only matter for consideration: If you will take the case. And, if so, when can you hear our motions to dismiss.

The Court: Mr. Hatch, you represent whom?

Mr. Hatch: Continental Casualty.

The Court: And you?

Mr. Egan: The three Macris.

Mr. Hatch: And at this time I appear for W. R. McKelvy.

On the top of the file you will find the requirements regarding the Judge who considers the case and I suppose he will ask you to consider that.

The Court: Did you say there was some sheet——

Mr. Hatch: I believe on top of the file there should have been a typewritten sheet. A yellow sheet.

The Court (Looking at file): This motion to dismiss [4] would be the second amended——

Mr. Hatch: Motions to dismiss the second amended Complaint are on file, but our sole purpose in being here today is to determine when, and if, we can hear it.

The Court: But this is the Second Amended Complaint?

Mr. Hatch: Yes, the Second Amended Complaint.

The Court: Was this action dismissed? This action was never tried on its merits?

Mr. Hatch: No. There has been a dismissal on each of the first two complaints.

The Court: Upon motions to dismiss?

Mr. Hatch: Upon motions to dismiss.

The Court: Is Mr. Schaefer here?

Mr. Schaefer: Yes, your Honor.

The Court: You are the Plaintiff?

Mr. Schaefer: Yes.

The Court: Do you wish to make any comment?

Mr. Schaefer: No, I don't think there is any comment necessary on my part. The situation as of now is as represented by Counsel for the Defendant.

The Court: You are appearing as your own counsel?

Mr. Schaefer: Yes. I was unable to secure counsel in the State of Washington.

The Court: Are you an attorney yourself?

Mr. Schaefer: No, I am not. [5]

The Court: Gentlemen, I am a little reluctant to set a time, or to take any further action at all, without having a chance to read this matter over and become a little more familiar with it. It may involve some judgment, from the size of it, and from what you say, that, in order for the Court to come to an intelligent conclusion, I probably should have an opportunity to read the file.

I am wondering if I might reserve opinion on the disposition to be made—whether I should accept it and fix a time—until, say, next Monday. I don't mean to set next Monday for hearing arguments, but fix next Monday as a date to make further disposition, either as to whether this Court proceeds with the case or as to whether some other disposition should be made.

Is that acceptable to you?

Mr. Egan: That is agreeable to the Macris.

Mr. Hatch: I hope your Honor will. We feel like orphans.

The Court: It isn't that. It is a matter that has

had attention before and any conclusion I reach now would be without background.

Mr. Hatch: As a favor to Mr. Schaefer could your Honor read the file and set a date and give it to us by letter and then Mr. Schaefer would not have to make a trip.

Mr. Schaefer: It would be all right with me, the inconvenience.

The Court: Your suggestion is that the Court, after [6] he has an opportunity to examine it, advise you by letter, all parties——

Mr. Hatch: All parties.

The Court (Continuing): ——as to, first, the Court's taking the case, and, if so, as to a date for argument on the motions?

Mr. Egan: May I interrupt?

The Court: Yes.

Mr. Egan: Yes. At that time you will require the presence of all of us. Because this being the time of vacations, it will be a little difficult to fix a time unless your Honor might indicate a time and, if you agreed to accept the case, why, you could probably settle the time right now conditioned upon your accepting the case.

We were discussing that our vacations conflict and Mr. Schaefer may require additional time and, if we could agree upon a date now, conditioned upon your Honor's reviewing the file and accepting the case, that would settle the whole thing without our further appearing before you.

The Court: You would be heard, first, on the motions to dismiss.

Mr. Egan: Yes, sir.

The Court: How long will that take?

Mr. Hatch: We have consumed, usually, a morning or an afternoon with it.

The Court: Half a day?

Mr. Schaefer: I believe it will take me a good half day, if not more time than that, to get what I have to say orally in the [7] matter.

Mr. Hatch: We have never used over half a day yet.

The Court: Well, in the event Mr. Schaefer will take that time, and the matter was set for 10:00 o'clock, it might go into the afternoon. What suggestions have you for a time?

Mr. Hatch: Well, I think we will probably have to postpone it until the second or third week in August, according to the vacation schedules, because Mrs. Curry, who represents Mr. McKelvy, will be out, and then Mr. Egan will be out, and I will be out until the 5th or 6th of August.

The Court: August is a very bad month. What comment have you, Mr. Schaefer, as to time?

Mr. Schaefer: The only idea I have about it is that I wish the Court would take time enough to go into the whole of the file and analyze all the file so that a decision might be rendered at the time that the case is heard on the motion to dismiss for certain reasons that I may want to express myself on the hearing to dismiss.

The Court: But as to a day in August or July?

Mr. Schaefer: Well, any time would be all right

that meets with your desire on that, your Honor. Any time after three weeks, I would say.

The Court: Any time after?

Mr. Schaefer: Yes, later than that.

The Court: In other words, July is not acceptable for you either. [8]

Mr. Schaefer: No. I thought it would probably take three weeks for your Honor to have time enough to peruse the whole of the Complaint.

Mr. Hatch: Might I suggest August 16th, your Honor?

The Court: I won't be here. The only days in August that the Court will be here are the 1st, 2nd and 3rd, and then the last week of August, possibly; possibly the 30th and 31st.

Mr. Egan: Did I understand you to say the 1st, 2nd and 3rd will be open?

The Clerk: We have four jury cases set for July 31st. Some will go over.

The Court: I am inclined to believe it will have to go over until September.

Mr. Hatch: Maybe we better appear on Monday. I can remember mine through August but if we get into September I have to look for my trial calendar before we agree on a date. I know we have a lot of cases set in September.

The Court: The Court is also hearing matters in the Eastern District and at that time the Calendar and matters assigned would be heard. That is what I would suggest—that the matter go over until Monday. By that time I will have had a chance to read the file, not for completeness but to have some idea what the issue is.

Now, I do not like to have Mr. Schaefer come up here——

Mr. Schaefer: That is quite all right. I will be here.

The Court (Continuing) ——unnecessarily, and, if [9] you should see fit not to appear, or accept the decision at that time without appearance, I can see no reason why you have to come because what will be done on Monday is to determine, first, if the Court will accept the case and then set a date for hearing motions.

Mr. Schaefer: That will be 10:00 o'clock on Monday?

The Court: 10:00 o'clock, Monday.

Mr. Hatch: Thank you, your Honor.

Mr. Schaefer: Thank you.

(Whereupon, other ex parte matters were considered and at 2:40 o'clock p.m., July 2, 1951, hearing was adjourned.)

Certificate

I, Earl V. Halvorson, official court reporter for the within-entitled court hereby certify that the foregoing is a full and complete transcript of matters herein set forth.

..... [10]

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Before: The Honorable William J. Lindberg,
United States District Judge.

July 9, 1951—10:00 A.M.

Appearances:

M. C. SCHAEFER, The Plaintiff,
Appeared on behalf of Plaintiff; and

GRANVILLE EGAN, ESQ.,
Appeared on behalf of Sam Macri, Don
Macri and Joe Macri, Defendants; and

MRS. ALTHA P. CURRY, of
SKEEL, McKELVY, HENKE, EVENSON
and UHLMANN,
Appeared on behalf of W. R. McKelvy,
Defendant.

Whereupon, the following proceedings were had,
to wit: [2*]

The Clerk: Number 2673, M. C. Schaefer,
Plaintiff, vs. Sam Macri, Don Macri and Joe Macri,
W. R. McKelvy, and Continental Casualty Com-
pany, Defendants.

The matter is on for fixing a time for hearing
Defendant's motion to dismiss second amended com-
plaint of Plaintiff. Mrs. Curry for Defendant, Mr.
Egan for Defendant, and Mr. Schaefer for himself.

* Page numbering appearing at top of page of original Reporter's
Transcript of Record.

Mrs. Curry: I am here representing McKelvy, Defendant. Mr. Hatch will not be here.

The Court: At the time the matter came before the Court a week or so ago the matter was placed on the Court's desk just before convening and I didn't have an opportunity to go over it. I haven't attempted to examine the pleadings and all the file in detail, although I have gone over them and am aware, generally, of what has happened.

Now the Court is disposed to accept the transfer of this matter, at least for the purpose of hearing motions to dismiss, and I had in mind setting down the matter for argument on Monday, August 6th, if that is satisfactory.

Mr. Egan: That will be satisfactory to Defendants Macri.

Mrs. Curry: I have no objection. I do not want it for two weeks beginning the 16th of July.

The Court: I understood you would be away that period.

Mrs. Curry: Yes. [3]

The Court: It was set down earlier but it was thought it might conflict with your——

Mrs. Curry: No. Well, the 30th would make it rather crowded. I would prefer the 6th.

The Court: Mr. Schaefer?

Mr. Schaefer: That is all right, your Honor.

The Court: Now I will say this: That this matter is up now upon motion to dismiss on the Second Amended Complaint, that being the third Complaint filed.

Mrs. Curry: That is right.

Mr. Schaefer: That is right.

The Court: At the time——

The Clerk: We were to set it for 11:00 o'clock that morning because there were other matters scheduled from 10:00 to 11:00 on August 6th.

The Court: At the time there will be three appearances for the Defendants?

Mrs. Curry: Yes, your Honor.

The Court: I am wondering about the time. Do you have in mind dividing some of that time, or——

Mrs. Curry: I am amenable to any suggestion of the Court on that.

The Court: The Court had in mind this: Mr. Schaefer indicated he wanted considerable time. I appreciate, Mr. Schaefer, your position but, of course, the Court's time is limited. I had in [4] mind giving one and a half ($1\frac{1}{2}$) hours to each side as a maximum. Now, I would suggest this to Mr. Schaefer: On this argument—I would say, first of all, that I gave that much time in view of the request made by Mr. Schaefer—now——

Mr. Egan: That will take us all day. I would suggest that forty-five (45) minutes be given to Mr. Schaefer and that we divide forty-five (45) minutes. That will be sufficient time.

Mr. Schaefer: I don't think it will be. I think I will require more time than that.

The Court: The Court realizes that this matter has been before various judges and, unfortunately, was delayed. On the other hand, the Plaintiff, not having counsel, is in somewhat different position than if he was represented by counsel.

Without fixing time, the Court will allow the maximum time of one and a half ($1\frac{1}{2}$) hours per side.

I will say this, Mr. Schaefer, that in making this argument I would suggest that you address your argument to the points raised in the last ruling of the Court, namely, to meet those specific issues and to indicate wherein your Second Amended Complaint meets the defect of the former complaint, because, reading briefly, the comments made by former ruling, the objections, among other things, has been to the lack of specific allegations of conspiracy, and so on.

There is no purpose in the Court's listening to argument on the issues, so I suggest that you address your argument to showing—to the issue of showing—wherein this Complaint meets the defect of the [5] former Complaint.

Do you understand?

Mr. Schaefer: I understand what you mean.

The Court: Is there any further comment?

Mrs. Curry: No. Eleven o'clock, August 6th.

The Court: Eleven o'clock, August 6th. At that time the Court is hopeful that less time than indicated will be taken, but I had in mind Mr. Schaefer's request for half a day.

Mrs. Curry: Thank you.

Mr. Schaefer: Thank you.

(Whereupon, at 10:30 o'clock a.m., July 9, 1951, hearing was adjourned.)

Certificate

I, Earl V. Halvorson, official court reporter for the within-entitled court hereby certify that the foregoing is a full and complete transcript of matters herein set forth.

.....

[Endorsed]: Filed July 12, 1951. [6]

[Title of District Court and Cause.]

MOTION FOR ORDER PERMITTING FILING
OF SUPPLEMENTAL COMPLAINT

Comes now plaintiff and respectfully moves the Court for an order permitting the filing of a supplemental complaint on the grounds and for the reasons that the public records of the Superior Court in the State of Washington for King County show that shortly prior to the time plaintiff retained the services of defendant, McKelvy, to handle the requested litigation more fully described in plaintiff's amended complaint against the Defendants Macri and Continental Casualty Company, that said Defendant McKelvy was then representing said Defendants Macri; that Case No. 356892 was filed on October 10, 1944, by the said three Defendants Macri, d.b.a. Macri Brothers, against James E. McHugh, et al., that the defendant, W. R. McKelvy, was attorney of record for said Macris from the date of filing thereof, on October 10, 1944, through the conclusion of said case, which was dis-

missed by stipulation and order of dismissal on April 4, 1945, and that said public records further show that in Case No. 362898 Superior Court, King County, Washington, filed January 1, 1945, wherein Adeline E. Towey was plaintiff and Continental Casualty Company was defendant, the said W. R. McKelvy was attorney of record for said Continental Casualty Company, thus making it clear beyond any shadow of doubt that Defendant McKelvy represented the Defendant Continental Casualty Company, and represented the Defendants Macri in other litigation at the very time Defendant McKelvy purportedly was acting for and in behalf of plaintiff herein.

Plaintiff further moves the Court for an order to further amend by naming as an additional party defendant, one B. J. Rask, and allege, in substance, with respect thereto that on or about March 8, 1951, said Rask, who prior to that time was a total stranger to plaintiff, called upon plaintiff representing that he, Rask, was in the insurance and bonding business and sought plaintiff's business in that line, but very soon after the meeting began, said Rask divulged that he was intimately versed in the details of the matters involved in this lawsuit, and threatened the life and welfare of the plaintiff and intimated plaintiff and his family if plaintiff persisted in this lawsuit, and plaintiff alleges that said Rask was and now is a member of said conspiracy and that the aforesaid acts by him were done for and at the direction of one or more of the originally named conspirators.

It appearing that said Rask is a necessary and proper party to this suit and that appropriate allegations as to his participation are necessary for a proper allegation of my case, I respectfully move the Court for permission to file a supplemental complaint.

Plaintiff further moves the Court for permission to supplement subparagraph I of Paragraph VI on page 12, by adding to the end of the first sentence the following clause: "And that said Continental Casualty Company representative agreed to such deletion only after first securing the approval of W. R. McKelvy in Seattle by long distance telephone call." And to correct the date in the first line of said subparagraph I by changing it from November 9th to November 4th; the draft was delivered on the 4th and paid on the 9th.

/s/ M. C. SCHAEFER,
Plaintiff.

[Endorsed]: Filed August 6, 1951.

[Title of District Court and Cause.]

MEMORANDUM OF AUTHORITIES IN SUPPORT OF DEFENDANT, McKELVY'S MOTION TO DISMISS THIRD AMENDED COMPLAINT

A complaint must allege facts showing violation of right.

Patten v. Dennis,

134 F. (2d) 139 (9 Cir.);

Kamm v. Flank,

(N.J.) 195 A. 629; 9 A.L.R. 1.

“Accurately speaking there is no such thing as a civil action for conspiracy. The action is for damages caused by acts committed pursuant to a formed conspiracy, rather than by the conspiracy itself; and unless something is actually done by one or more of the conspirators which results in damage, no civil action lies against anyone. The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof—the damage—not the conspiracy or the combination. * * * To sustain a civil action for conspiracy, special damages must be proved.”

11 Am. Jur. “Conspiracy,” Sec. 45.

The complaint must allege facts constituting civil conspiracy. The mere conclusions of “conspiracy” are insufficient.

Ransom v. Dollar S.S. Line,

2 F.S. 409;

Puget S. P. & L. Co. v. Asia,

2 F. (2d) 491;

Black & Yates v. Mahogany Assoc.,

129 F. (2d) 227. Cert. denied, 317 U. S.
672.

No cause of action in conspiracy exists because:

(a) No agreement or concert of the parties to accomplish an unlawful purpose or a lawful purpose unlawfully.

15 C.J.S. "Conspiracy," Section 1.

Kietz v. Gold Point Mines, Inc.,

5 Wn. (2d) 224.

(b) Combination must be a meeting of the minds.

Calcutt v. Gerig,

271 Fed. 22 (6 Cir.)—citing:

Alaska S.S. Co. v. International Longshoremen's Assn. of P.S., 236 F. 964 (Neterer, J.);

Ransom v. Matson Navigation Co.,

1 F.S. 224;

Asby v. Peters,

(Neb.) 258 N.W. 639, 99 A.L.R. 843;

Winsor Theater Co. v. Wallbrook Amusement Co., 94 F.S. 389.

There must be an unlawful act alleged which constitutes a fraud on the plaintiff.

Ransom v. Dollar S.S. Line,

2 F.S. 409;

Puget Sound P. & L. Co. v. Asia,
2 F. (2d) 491;

Eyak River Packing Co. v. Huguenot,
143 Wash. 227.

Circumstances can't be relied upon which are as consistent with the lawful as an unlawful purpose. In such case there is no conspiracy.

Dunlap v. Seattle National Bank,
93 Wash. 569;
Dart v. McDonald,
107 Wash. 537.

It is necessary to allege damage. There is no damage alleged as a consequence of any act of the defendants.

Moffett v. Commercial Tr. Co.,
87 F.S. 438;
Ransom v. Dollar S.S. Line,
2 F.S. 409;
State v. McIhenney,
(La.) 9 So. (2d) 467, 142 A.L.R. 533.

An act lawful by an individual is not unlawful by combination unless an unusual circumstance results to the injury of a third party and then the action of the group may have the excuse or justification of self-interest or competition.

Delorme v. International Bar Tenders Union
Assn., 139 P. (2d) 619;

Nustadt v. Employers Liability Assur. Corp.,
(Mass.) 21 N.E. (2d) 538, 123 A.L.R. 134.

11 Am. Jur. "Conspiracy," Section 46.

The bringing of an action or defense of an action is neither fraudulent nor unlawful.

Puget Sound P. & L. Co. v. Asia.

2 F. (2d) 491;

Abbott v. Thorne,

34 Wash. 691;

Manhattan Quality Clothes v. Cable,

154 Wash. 654.

The graveman of a civil action for conspiracy is found in the overt act which results from the conspiracy and culminates in damage to the plaintiff.

Park In Theaters v. Paramount-Richards

Theaters, 90 F.S. 927;

Nalley v. Oyster,

230 U.S. 165.

Respectfully submitted.

/s/ W. PAUL UHLMANN,

Attorney for Defendant,

W. R. McKelvy.

The cause of action if in conspiracy is barred by Section 165 Remington's Revised Statutes.

Mitchell v. Greenough,

100 F. (2d) 184.

[Endorsed]: Filed August 6, 1951.

[Title of District Court and Cause.]

MEMORANDUM OF M. C. SCHAEFER RE-
SISTING MOTION OF DEFENDANTS
TO DISMISS PLAINTIFF'S SECOND
AMENDED COMPLAINT

Conspiracies need not be established by direct evidence of the acts charged. They may, and generally must, be proved by a number of indefinite acts, conditions, and circumstances which vary according to the purposes to be accomplished. The very existence of a conspiracy is generally a matter of inference deducted from certain acts of the persons accused which are committed in pursuance of an apparently criminal or unlawful purpose in common to them. The existence of the agreement or joint assent of the minds need not be proved directly, but may be inferred by the jury from other facts proved. It is not necessary to prove that the defendants came together and actually agreed upon the unlawful purpose and its pursuit by common means. If it is proved that the defendants, with a view to the attainment of the same purpose, pursued such purpose by their acts—often by the same means, each performing some part thereof—the jury will be justified in concluding that they were engaged in a conspiracy to effect a common object. If, therefore, one concurs in a conspiracy, no proof of agreement to concur is necessary in order to make him guilty. His participation in the conspiracy may be established without

showing his name or giving his description. 11 Am. Jur., Conspiracy, Section 38.

When a conspiracy is established, everything said, written, or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done, or written by every one of them, and may be proved against each. 11 Am. Jur., Conspiracy, Section 40.

The prosecutor may either prove the conspiracy, which renders the acts and declarations of the conspirators admissible in evidence, or he may prove the acts of the different persons and thus prove the conspiracy. However, there must be some tangible, material evidence of the conspiracy or a promise of its production before the Court can properly admit evidence of statements made in the absence and without the knowledge of the party against whom they are offered. The evidence need not be direct, positive, and conclusive; but there should be some evidence, and it is for the Court, in the first instance, to say whether or not it exists. 11 Am. Jur., Conspiracy, Section 42.

The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof—the damage—not the conspiracy or the combination. 11 Am. Jur., Conspiracy, Section 45.

The connection between the parties having been established, whatever was done in pursuance of the conspiracy by one of the conspirators is considered as the act of all the conspirators; all are equally liable therefor as joint tort-feasors, regardless of whether they were original parties to the conspiracy

and irrespective of either the fact that they did not actively participate therein or the extent to which they benefited thereby. However, where the unlawfulness of a conspiracy arises from acts subsequent to its formation and to those originally contemplated, only those persons participating in the unlawful acts are liable therefor. It is not necessary, in order to establish that the defendants are co-conspirators, to prove that the conspiracy originated with them, or that they met during the process of the concoction of the scheme. 11 Am. Jur., Conspiracy, Section 48.

Attention is also drawn to citations appearing in Vol. 3, Permanent A.L.R. Digest, Conspiracy, Section 1. Attention is specifically drawn to case of *A. T. Stearns Lumber Co. vs. Howlett*, 52 A.L.R. 1125, holding that the unlawfulness of a conspiracy may be found either in the end sought or the means used.

The complaint does allege a concert of the parties to accomplish either an unlawful purpose or a lawful purpose unlawfully.

In 168 P (2d) 797, *Lyle vs. Hoskins*, the Washington Supreme Court laid down the rule that allegation of a conspiracy and proof thereof by circumstantial evidence is all that can be required due to the very nature of the offense and that direct and positive allegation and proof is not required.

Here plaintiff alleges in Paragraph VI, that between 3/2/44, and 8/18/50, defendants did wrongfully and maliciously conspire, combine and confederate together with willful and malicious intent

to injure and damage plaintiff, and that as the direct and proximate result of the overt acts committed pursuant thereto (which said acts are alleged in detail in the pages following) plaintiff suffered the damages more fully alleged in Paragraph VII.

In the light of all authorities cited by defendant and of *Lyle vs. Hoskins*, 168 P (2d) 797, *supra*, it is abundantly clear that the web of intrigue, conflicting interests, and interrelated activity of the several parties defendant, that the wealth of detail alleged in support of the general allegation of a conspiracy to damage plaintiff amply support plaintiff's allegation, prevents its being a mere conclusion and is necessary in order to state a cause of action.

The Statute of Limitations does not bar this action.

The running of the Statute of Limitations in a civil action for conspiracy has not been the subject of judicial determination in many instances. However, in *State vs. Arkansas Lumber Co.*, 260 Mo. 212, 169 SW 145, the Court held that the Statute commences to run as of the date of the last overt act under the conspiracy. Also in *Montgomery vs. Crum*, 199 Ind. 660, 161 NE 251, the Court also held that in an action for damages resulting from one continuous wrong extending over a period of years the Statute of Limitations does not begin to run until there is a cessation of the overt acts constituting the wrong. To the same effect also is the holding in *Clark vs. Mochetti*, 92 Colo. 365, 21 P (2d) 182; 41 Hun 645, 3 N.Y.S.R. 309;

In *Northern Kentucky Tel. Co. vs. Southern Bell Tel. Co.*, 73 F. (2d) 333, 97 A.L.R. 133, is an exhaustive opinion citing the Rule in Civil conspiracies, and holds that the statute begins to run as of the last contemplated series of acts and further holds that the act of one conspirator is attributable to all after the formation of the conspiracy and during its existence. See also the annotation in 97 ALR 137.

It must also be noted that in this action the Federal Court will ordinarily apply state rules as it is a case where jurisdiction is based on diversity and on amount. No decision can be found wherein the Supreme Court of the State of Washington has ruled on the point involved here and none is cited by defendant.

The case relied on by defendant, i.e., *Mitchell vs. Greenough*, is one in which the overt act clearly occurred beyond the limitation period; here, however, there are acts alleged within the limitation period and within a few months of the filing of plaintiff's original complaint.

As held in the case of *Moffett vs. Commerce Trust Company*, 75 F. Supp. 303, where jurisdiction is based upon diversity, a Federal Court will apply state rules with respect to statutes of limitation. No decision can be found in which the Supreme Court of the State of Washington has ruled as to what the applicable statutory period of limitation is for civil conspiracy, nor how to compute the time, that is, from the last overt act or from

some other time. Accordingly, the matter is apparently one of first instance in this court, and the court is at liberty to settle upon whatever rule impresses the court as being the best reasoned and most equitable.

[Endorsed]: Filed August 6, 1951.

[Title of District Court and Cause.]

ANALYSIS OF SECOND AMENDED COMPLAINT

Second Amended Complaint			Where Found in
Para.	Page	Line	Previous Complaints
I	1	13	All previous Complaints contain same paragraph.
II	1	20	L. 23, p. 1—#2
		21-24	New allegation.
		24-26	L. 27, p. 5—#2
			L. 31, p. 1—#2
		26-28	L. 1, p. 2—#2
		29-31	L. 29, p. 1—#2
		32-33	L. 29, p. 2—#2
	2	1-3	L. 19, p. 1—#2
		4-5	L. 1, p. 5—#2
III	2	7-10	L. 29, p. 1—#2
		10-12	L. 22, p. 2—#2
		12-15	L. 32, p. 1—#2
		15-17	L. 31, p. 1—#2
		18 (Ex. A)	P. 2-4—#2
IV	2	21-25	L. 1, p. 2—#2
		26-29	New, but can be inferred from reading Exhibits pleaded in #2.
V	2	31-33)	L. 1, p. 5—#2
	3	1-2)	
VI		4-15	(L. 23, p. 1—#2
			(L. 27, p. 5—#2
			(L. 20, p. 27—#2
			(General conclusions of law.

Second Amended Complaint Para.	Page	Line	Where Found in Previous Complaints
VI(A)		16-20	L. 31, p. 5—#2 plus new conclusions of law.
		20-25	L. 18, p. 12—#2
		26-27	New conclusions of law.
		27-28	L. 31, p. 5—#2
		28-31	Inferential.
		31-32	(L. 27, p. 5—#2
	4	1	(
VI(B)		2-4	L. 27, p. 6—#2
		4 (Ex. B)	P. 7-10—#2
		7-9	New.
VI(C)		10-20	L. 13, p. 12—#2 plus new allegation that McKelvy then became conspirator.
		21-32	(L. 18, p. 12—#2
	5	1-5	(
		6 (Ex. C,D)	P. 16-20—#2
		7-14	Paraphrase of Ex. E
		15 (Ex. E)	P. 14-15—#2
		17-19	L. 28, p. 12—#2
		19-31	P. 13—#2
		31-32	New conclusion.
	6	1-7	L. 27, p. 15—#2
		7	L. 31, p. 20—#2
		8	New allegation.
		9-16	L. 1, p. 16—#2
		17-18	L. 1, p. 21—#2
		19-25	Paraphrase of Ex. F.
		25-27	L. 1, p. 21—#2
		27-28	L. 6, p. 27—#2
		29 (Ex. F)	P. 21—#2
VI(D)		31-33	(L. 28, p. 2—#1
	7	1-5	(
		5-6	L. 15, p. 23—#2
		7 (Ex. G)	P. 23-25—#2
		8-10	L. 15, p. 23—#2
		10-12	L. 10, p. 23—#2
		13 (Ex. H)	P. 22-23—#2
		14-16	L. 5, p. 3—#1
		16-17	L. 11, p. 25—#2
		18-23	L. 12, p. 25—#2
		23-26	L. 22, p. 25—#2
		26-29	P. 25-26 Paraphrase—#2
		29-30	L. 6, p. 26—#2
		30-31	New allegation.
		32	(L. 30, p. 26—#2
	8	1-3	(
		4	L. 14, p. 27—#2

Second Amended Para.	Complaint Page	Line	Where Found in Previous Complaints
VI (D) Cont.		5-9	L. 8, p. 27—#2
		10-12	L. 13, p. 6—#1
		13-14	Inferential.
		14-16	L. 13, p. 36—#2
		16-18	Inferential.
		19 (Ex. I)	P. 36-45—#2
		21-23	L. 20, p. 27—#2
		24-32	Conclusions.
	9	1-3	Conclusions.
VI(E)		4-5	L. 24, p. 27—#2
		6	L. 3, p. 28—#2
		6-7	Inferential.
		7-14	L. 4, p. 28—#2
VI(F)		15-18	L. 13, p. 28—#2
		19 (Ex. J)	P. 29-33—#2
		20-29	L. 13, p. 28—#2
		29-31	New allegation.
VI(G)		32	(L. 22, p. 33—#2
	10	1-4	(
		5 (Ex. K)	P. 33-34—#2
		6-7	L. 24, p. 33—#2
		7-9	L. 1, p. 35—#2
		10 (Ex. L)	P. 35—#2
		11-14	L. 1, p. 35—#2
		15-17	New allegation.
		18-21	L. 1, p. 46—#2
		21-23	Inferential.
		23-29	L. 7, p. 46—#2
		31 (Ex. M)	P. 46-62—#2
		31 (Ex. N)	P. 62-65—#2
VI(H)	11	1	Conclusion.
		2	L. 24, p. 34—#2
		4-6	New allegation.
		6-7	L. 14, p. 65—#2
		8 (Ex. O)	P. 65-66—#2
		9-10	L. 14, p. 66—#2
		10 (Ex. P)	P. 66—#2
		11-12	L. 5, p. 66—#2
		13	L. 6, p. 67—#2
		14-15	L. 7, p. 67—#2
		15-16	Inferential.
		16-18	L. 29, p. 69—#2
		19 (Ex. Q)	P. 67-73—#2
		21-22	L. 32, p. 73—#2
		22-24	L. 3, p. 74—#2
		25 (Ex. R)	P. 74-82—#2

Second Amended Complaint Para.	Page	Line	Where Found in Previous Complaints
VI (H) Cont.		27-29	L. 1, p. 74—#2
		28 (Ex. S)	P. 82-83—#2
		30-32	L. 29, p. 83—#2
		31 (Ex. T)	P. 83-84—#2
	12	1-2	L. 29, p. 83—#2
		2-4	L. 1, p. 85—#2
		4-5	L. 3, p. 85—#2
		5-6	L. 4, p. 85—#2
		6	L. 10, p. 85—#2
		7-9	L. 8, p. 85—#2
		10-13	New conclusions of law.
VI(I)		14-22	L. 11, p. 85—#2
		22-25	New allegation.
VI(J)		26-32	L. 2, p. 87—#2
	13	1 (Ex. U)	P. 86—#2
		3-6	Inferential
		6-8	L. 6, p. 87—#2
		9 (Ex. V)	P. 87-90—#2
		10-13	L. 24, p. 90—#2
		13-15	L. 22, p. 90—#2
VI(K)		16-19	L. 15, p. 91—#2
VII		21-32	(Allegations re damages—
	14	1-7	(conclusions

Respectfully submitted,

/s/ WILLARD HATCH.

Attorneys for Continental
Casualty Company.

[Endorsed]: Filed August 6, 1951.

In the District Court of the United States for
the Western District of Washington, Northern
Division

No. 2673

M. C. SCHAEFER, an Individual,

Plaintiff,

vs.

SAM MACRI, DON MACRI and JOE MACRI,
Individuals; W. R. McKELVY; CONTI-
NENTAL CASUALTY COMPANY, a Cor-
poration; and A. J. GOERIG and CLYDE
PHILP, Individuals,

Defendants.

ORDER OF DISMISSAL

This matter came on regularly for hearing before the above-entitled court on August 6, 1951, on motions for an order to dismiss the above-entitled action by defendants Sam Macri, Don Macri and Joe Macri, by defendant W. R. McKelvy, and by defendant, Continental Casualty Company, a corporation. Defendants Macri appeared by their attorney, Granville Egan; defendant McKelvy appeared by his attorney, A. P. Curry; and, defendant Continental Casualty Company appeared by its attorneys, Carl E. Croson and Willard Hatch. The plaintiff M. C. Schaefer appeared per se. Prior to the argument the plaintiff presented to the court a Motion for Order Permitting Filing of Supplemental Complaint, which petition was without veri-

fication and also without any supporting affidavit as to factual matters. The defendants, being prepared to present their motion, stipulated that any facts contained in the motion might be considered by the court in passing upon the motions of the respective defendants. After discussion it was so stipulated by all parties, and the court reserved passing upon the Motion for Order Permitting Filing of Supplemental Complaint until after hearing the arguments on the Motions to Dismiss. The Court then requested the parties to proceed with arguments for and against the motions filed by the above designated defendants, and after hearing arguments on the motions by the respective attorneys for the defendants appearing before the court and by M. C. Schaefer, plaintiff, appearing per se, and the court having stated that it was his intention to grant the motions of the respective defendants, and having been requested by all parties, plaintiff and the three defendants before the court, to grant the Order of Dismissal with prejudice and without right to amend,

It Is Now, Therefore, Ordered and Adjudged that the above-mentioned motions to dismiss the complaint, and each of them, are granted, and the above-entitled action as to defendants Sam Macri, Don Macri, and Joe Macri, defendant W. R. McKelvy, and defendant Continental Casualty Company, a corporation, is hereby dismissed with prejudice and without leave to amend.

And the Court having granted the motions to dismiss,

It Is Further Considered and Ordered that the Motion for an Order Permitting the Filing of a Supplemental Complaint, made by the plaintiff, be, and hereby is, denied.

It Is Further Ordered and Adjudged that the defendants, and each of them, be, and hereby are, granted a judgment for costs against the plaintiff as provided by statute and rules of court.

Done in Open Court this 7th day of August, 1951.

/s/ WILLIAM J. LINDBERG,
Judge.

Approved:

SAM MACRI,

DON MACRI,

JOE MACRI,

By /s/ GRANVILLE EGAN.

W. R. McKELVY,

By /s/ A. P. CURRY.

CONTINENTAL CASUALTY
COMPANY,

By /s/ CARL E. CROSON.

Receipt of Copy acknowledged.

[Endorsed]: Filed Aug. 7, 1951.

[Title of District Court and Cause.]

ORDER SETTING AMOUNT
OF BOND ON APPEAL

This matter coming on regularly for hearing before the undersigned Judge of the above-entitled Court upon motions by the defendants appearing herein for an order setting the bond for any appeal in a sum in excess of \$250 and the court being fully advised in the premises, now, therefore,

It Is Hereby Ordered that plaintiff upon giving notice of appeal shall file a bond for costs on appeal in the sum of \$250.00 for each of the defendants, or a total cost bond of \$750.00.

Done in open court this 7th day of August, 1951.

/s/ WILLIAM J. LINDBERG,
Judge.

Presented by:

/s/ A. P. CURRY,
Attorney for Defendant,
W. R. McKelvy.

/s/ GRANVILLE EGAN,
Attorney for Defendants
Macri.

[Endorsed]: Filed Aug. 7, 1951.

[Title of District Court and Cause.]

APPEAL BOND

Know All Men by These Presents:

That I, M. C. Schaefer, am held and firmly bound unto Sam Macri, Don Macri and Joe Macri; to Continental Casualty Company, a corporation; and to W. R. McKelvy in the penal sum of Seven Hundred Fifty and no/100 (\$750.00) Dollars, which said sum has been deposited in cash with the clerk of the above-entitled Court, payable to the above designated obligees, their heirs, executors or assigns, for which payment to be made I bind myself, my heirs and executors firmly by these presents.

The condition of this obligation is such that:

Whereas, the said M. C. Schaefer has taken an appeal to the Circuit Court of Appeals for the Ninth Circuit from the Order of the above-entitled Court dismissing with prejudice plaintiff's Complaint on August 7, 1951, and in connection therewith the said trial court by Order fixed the Appeal Bond in the sum of Seven Hundred Fifty and no/100 (\$750.00) Dollars.

Now, Therefore, if the said M. C. Schaefer shall pay all costs and sums which may be awarded to the above obligees, not exceeding Seven Hundred Fifty and no/100 (\$750.00) Dollars by Order of said appellate court pursuant to said appeal, then this obligation shall be void; otherwise to remain in full force and effect.

/s/ M. C. SCHAEFER,

Plaintiff and Appellant.

[Endorsed]: Filed Sept. 4, 1951.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF
CONTENTS OF RECORD ON APPEAL

Comes now appellant, M. C. Schaefer, and designates the following pleadings, proceedings and memorandum which he wishes prepared for transmission to the Circuit Court of Appeals in connection with the appeal heretofore filed in the above-entitled cause:

1. Plaintiff's original complaint.
2. Motion of defendant McKelvy to dismiss plaintiff's original complaint.
3. Motion of defendants Sam Macri, Don Macri, and Joe Macri to dismiss plaintiff's original complaint.
4. Motion of defendant Continental Casualty Company to dismiss plaintiff's original complaint.
5. Complete transcript of reporter's notes of the hearing on the motions of the defendants W. R. McKelvy, Sam Macri, Don Macri and Joe Macri, and Continental Casualty Company to dismiss plaintiff's original complaint.
6. Order granting the motions to dismiss.
7. Plaintiff's amended complaint.
8. Motion of defendant W. R. McKelvy to dismiss.
9. Motion of Sam Macri, Don Macri and Joe Macri to dismiss.
10. Motion of Continental Casualty Company to dismiss.

11. Complete transcript of reporter's notes on hearing on said motions to dismiss.

12. Order granting motions to dismiss.

13. Plaintiff's second amended complaint.

14. Motion of defendant W. R. McKelvy to dismiss.

15. Motion of defendants Sam Macri, Don Macri and Joe Macri to dismiss.

16. Motion of defendant Continental Casualty Company to dismiss.

17. A complete transcript of the reporter's notes on hearings of motions to dismiss.

18. Plaintiff's motion for permission to file supplemental complaint.

19. Order of dismissal.

20. Order fixing appeal bond.

21. Notice of appeal.

22. Appeal bond.

23. Statement of points on appeal.

24. Appellant's designation of contents of record on appeal.

25. All letters, notes, memoranda or documents of any kind or character not hereinbefore specifically mentioned, it being intended that the complete file be sent up on appeal.

Dated this 31st day of August, 1951.

Respectfully submitted,

/s/ M. C. SCHAEFER,

Plaintiff and Appellant.

[Endorsed]: Filed Sept. 4, 1951.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Comes now the plaintiff and appellant herein, M. C. Schaefer, and pursuant to Rule 19 of the above-entitled Court, states that he will rely upon the following points in the prosecution of his appeal from the order of dismissal herein:

1. The United States District Court erred in entering an order granting the motions to dismiss in favor of the defendants and against this plaintiff, for the reasons that the complaints herein do state a cause of action, and there is nothing in the file or in any of the records that will sustain this order granting the motions to dismiss.

2. The United States District Court erred in entering an order granting the motions to dismiss in favor of the defendants and against this plaintiff, for the reasons that the complaints herein do state tortious acts and overt acts within the statute of limitations and within a few months of the filing of the original complaint herein.

3. The United States District Court erred in denying plaintiff's motion to file supplemental complaint alleging additional facts with respect to the defendant W. R. McKelvy and naming as an additional party one W. R. Rask and alleging new matter as to him in that said additional allegation of new matter are extremely vital to plaintiff's case.

/s/ M. C. SCHAEFER,
Plaintiff and Appellant.

[Endorsed]: Filed Sept. 4, 1951.

Telegram
May 8, 1951

From M. C. Schaefer to Judge Driver

Portland, Oregon, May 8, 1951.

To (Sam Driver)

Hon. Sam Driver,
303 Federal Bldg.,
Spokane, Wash.

Re Schaefer vs. Macre—Object to Any Ground
for Dismissal Except Redundency. Letter Follows.

M. C. SCHAEFER.

[Endorsed]: Filed Sept. 27, 1951.

Letter
May 8, 1951

From M. C. Schaefer to Judge Driver

Portland, Oregon.
May 8, 1951.

The Hon. Sam M. Driver,
United States District Judge,
303 Federal Building,
Spokane, Washington.

Re: Schaefer vs. Macri et al.,
No. Civil 2673.

Dear Judge Driver:

This will acknowledge receipt of copy of Order of
Dismissal submitted in behalf of the Defendant
McKelvy.

I object to the language beginning with the word "does" at the end of line 16, page 1, to and including the word "complaint" near the center of line 21. As I read your memorandum opinion your sole basis was the fact that the complaint is verbose or redundant.

Also as to proposed Order submitted in behalf of the Macris, I object, for the same reason, to the language beginning in line 22, page 1, with the word "fails" to and including the word "complaint" in line 24.

This same objection is made as to all defendants should the others incorporate such language in their orders.

Very truly yours,

/s/ M. C. SCHAEFER.

cc: Skeel, McKelvy, Henke, Evenson & Uhlmann,
914 Insurance Building, Seattle, Washington.
Granville Egan,
565 Olympic National Bldg.,
Seattle 4, Washington.
Carl E. Croson,
900 Insurance Bldg., Seattle 4, Washington.

[Endorsed]: Filed Sept. 27, 1951.

REPORTER'S CERTIFICATE

August 6, 1951

United States of America,
Western District of Washington—ss.

I, Earl V. Halvorsen, do hereby certify:

That I am a regularly appointed, qualified and acting official court reporter of the United States District Court for the Western District of Washington; that as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable William J. Lindberg, a United States District Judge sitting as a judge in the United States District Court for the Western District of Washington, held on August 6, 1951, at Seattle, Washington.

That the above and foregoing contains a full, true and correct transcript of the proceedings had in the above-entitled cause.

Dated this 27th day of August, 1951.

/s/ EARL V. HALVORSON,
Official Court Reporter.

[Endorsed]: Filed Sept. 27, 1951.

REPORTER'S CERTIFICATE

August 7, 1951

United States of America,
Western District of Washington—ss.

I, Earl V. Halvorson, do hereby certify:

That I am a regularly appointed, qualified and acting official court reporter of the United States District Court for the Western District of Washington; that as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable William J. Lindberg, a United States District Judge sitting as a judge in the United States District Court for the Western District of Washington, held on August 7, 1951, at Seattle, Washington.

That the above and foregoing contains a full, true and correct transcript of the proceedings had in the above-entitled cause.

Dated this 27th day of August, 1951.

/s/ EARL V. HALVORSON,
Official Court Reporter.

[Endorsed]: Filed Sept. 27, 1951.

Letter

August 21, 1951

From E. V. Halvorson to M. C. Schaefer

August 21, 1951.

Mr. M. C. Schaefer,
3535 East Burnside,
Portland 15, Oregon.

Dear Mr. Schaefer:

With respect to transcript of August 6 and 7, 1951, I will not be able to forward them until Monday, August 27, 1951. I will then air mail them.

Trusting delivery at that time will meet with your approval, I remain,

Sincerely yours,

/s/ EARL V. HALVORSON,
Official Reporter.

[Endorsed]: Filed Sept. 27, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT J. HAGE, et al.

State of Oregon,
County of Multnomah—ss.

We, the undersigned, being first duly sworn, each for himself on oath deposes and says:

That I was personally present in the Court Room of the United States District Court for the Western District of Washington at the hearing in the above-

entitled case had before the Honorable William J. Lindberg on August 6, 1951.

That I have carefully examined a copy of the transcript of such proceeding prepared and certified by Earl V. Halvorson to be true, correct and complete.

That I know of my own personal knowledge that some of the material appearing in said transcript is stated differently from what actually occurred; that some of the statements actually made have not been incorporated in the transcript; and that some of the matters contained therein never occurred.

I am willing to be sworn and under oath testify to the matters wherein the transcript certified by the reporter varies from the true facts within my own personal knowledge.

/s/ ROBERT J. HAGE,

/s/ PATRICIA HAGE,

/s/ GALE G. WHEELER,

/s/ PATRICK L. DARCY,

/s/ RAYMOND R. STAUB,

/s/ M. C. SCHAEFER,

/s/ GERTRUDE SCHAEFER.

State of Oregon,
County of Multnomah—ss.

Be It Remembered, That on this 22nd day of September, 1951, before me, the undersigned, a Notary Public in and for said County and State, personally

appeared the within named P. L. Darcy, Gale G. Wheeler, Robert Hage and Patricia Hage, husband and wife; Raymond R. Staub, and M. C. Schaefer and Gertrude Schaefer, husband and wife, known to me to be the identical individuals described in and who executed the within instrument and acknowledged to me that they executed the same freely and voluntarily.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year last above written.

[Seal] /s/ GOLDADA W. TOOKE,
Notary Public for Oregon.

My Commission expires June 11, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF WALTER W. VOSS, et al.

State of Washington,
County of King—ss.

We, the undersigned, being first duly sworn, each for himself on oath deposes and says:

That I was personally present in the Court Room of the United States District Court for the Western District of Washington at the hearing in the above-entitled case had before the Honorable William J. Lindberg on August 6, 1951.

That I have carefully examined a copy of the transcript of such proceeding prepared and certi-

fied by Earl V. Halvorson to be true, correct and complete.

That I know of my own personal knowledge that some of the material appearing in said transcript is stated differently from what actually occurred; that some of the statements actually made have not been incorporated in the transcript; and that some of the matters contained therein never occurred.

I am willing to be sworn and under oath testify to the matters wherein the transcript certified by the reporter varies from the true facts within my own personal knowledge.

/s/ WALTER W. VOSS,

/s/ CHRISTINE VOSS,

/s/ VIOLA N. HEALY,

/s/ PAUL C. VOSS,

/s/ GLADYS L. CARSON.

State of Washington,
County of King—ss.

Be It Remembered, That on this 25 day of September, 1951, before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within named Walter W. Voss, Christine Voss, Viola N. Healy, Gladys L. Carson and Paul C. Voss, known to me to be the identical individuals described in and who executed the within instrument and acknowledged to me that they executed the same freely and voluntarily.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal the day and year last above written.

[Seal] /s/ E. I. HEILINGLOH,
Notary Public in and for the County of King, State
of Washington, Residing at Seattle, Wash-
ington.

My Commission expires June 22, 1953.

[Endorsed]: Filed Sept. 27, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF M. C. SCHAEFER

State of Oregon,
County of Multnomah—ss.

I, M. C. Schaefer, being first duly sworn, depose and say that the following is a true and complete resume of dealings and conversations with Earl V. Halvorson, court reporter, with respect to procuring transcript of record to proceedings on August 6 and August 7, 1951, in the above-entitled case:

On Monday, August 6, 1951, after Court, plaintiff asked Mr. Earl V. Halvorson, the court reporter, to get up seven copies of the transcript of that day and mail them to plaintiff and asked when he could get them to plaintiff. Halvorson said, "I will have them in the mail to you by Thursday or Friday, the 9th or 10th."

On Tuesday, August 7, 1951, after Court, plaintiff

checked with Mr. Halvorson again and had him change the order of the 6th to only three copies and ordered also three copies of transcript of the hearing on the 7th. Mr. Halvorson then said: "I will have both out and in the mail not later than Monday, the 13th."

On Friday, August 17, 1951, plaintiff called Mr. Halvorson from Portland and Mr. Halvorson said the transcripts were in the envelope sealed with postage on it ready to mail last Monday, the 13th, but: "I am waiting for Judge Lindberg, the Judge always checks the papers before I mail them out. They will definitely be in the mail Monday, the 20th."

On Thursday, August 23, 1951, plaintiff received a letter from Mr. Halvorson dated on the 21st and mailed on the 22nd which states as follows: "With respect to transcript of August 6 and 7, 1951, I will not be able to forward them until Monday, August 27, 1951. I will then air mail them. Trusting delivery at that time will meet with your approval, I remain,"

On Friday, August 24, 1951, Mrs. Gilbert Tooke, plaintiff and plaintiff's wife drove to Seattle, checked at the Court House to ascertain if Judge Lindberg's court was in session, but found that his court was not in session. Plaintiff checked with an elevator girl as to Mr. Halvorson's office number. She suggested that plaintiff check with Judge Lindberg's secretary. Plaintiff then checked with the Judge's secretary. Plaintiff asked her what Halvorson's office number was and she told plaintiff it

was Room 808. Plaintiff asked: "Is the Judge in?" She said: "No." Plaintiff asked: "Is he yet on his vacation?" She said: "Yes, he is yet on his vacation, but might drop in sometime today." Plaintiff asked: "Do you know if Mr. Halvorson is in Seattle?" She said: "He lives in Tacoma, but may, of course, be in Seattle." She then gave plaintiff Halvorson's address and phone number in Tacoma. The three of us then left the Court House and later that day plaintiff called Mr. Halvorson at Tacoma. Mr. Halvorson said: "I wrote you a letter and haven't yet heard from Lindberg. I have everything ready to drop in the mail. The Judge will be in court Monday at 2:00 o'clock. We have a case on for that time, but I think I will perhaps get to see the Judge in the morning and will get the transcripts into the mail in the afternoon for sure." Plaintiff said: "Well, I thought the Judge and you only had a two-week vacation." Halvorson said: "That's right; it ends this week end." Plaintiff said: "You have the copies for me ready to mail out, so if the Judge were to call you at your home there, you could go right out and drop them in the mail?" Mr. Halvorson said: "Yes, I have them here and will do that." Plaintiff said: "The two days, the 6th and 7th, were two days that were part of or should have been the start of your vacations?" Halvorson said: "Yes."

A little later that afternoon we three drove to Halvorson's residence at Tacoma. Plaintiff asked Mr. Halvorson: "Might I see the transcripts, as I have a few things I would like to check in each of

them?" Mr. Halvorson said: "I don't have them here. They are in my office in Seattle and are all ready to put in the mail. I have taken them to the post office and had them weighed and the postage put on them—that's what I always do, so they are ready, so that as soon as the Judge checks them I can just drop them in the mail." Plaintiff said: "Well." Halvorson said: "The Judge's secretary has them." Plaintiff said: "Then the Judge hasn't got them with him on his vacation then?" Mr. Halvorson said: "Yes, he has; he's got all the copies with him. If they were here, why I'd be glad to open them up for you or give them to you and we'd save the postage. I'll see the Judge Monday and will get them in the mail in the afternoon and will mail them air mail, special delivery."

On Monday, August 27, 1951, plaintiff's wife and plaintiff went to the Court House and plaintiff checked the file herein and then plaintiff and his wife waited in the anteroom of Judge Lindberg's court. This was before the morning recess. At recess Mr. Halvorson came out of the Court Room. Plaintiff said: "Hello, Mr. Halvorson." Mr. Halvorson said: "I have all the papers in my Room 808. I still have to make the affidavits and put on the backs." Plaintiff said: "Then you will have your lunch by 12:30?" Halvorson said: "Well, let's say 1:00 o'clock. I'll be through earlier, but some of the others come into my office to eat their lunch—it's quiet up there—and they might not be through." Plaintiff said: "OK."

At about 11:00 o'clock Court recessed till 1:45.

While plaintiff was waiting for his wife to come out of the women's wash room, he was resting against the wall and near the door to Judge Lindberg's chambers. This door opened from within. Plaintiff saw it only as it closed, so did not see the party that had opened it, so as soon as plaintiff's wife came from the wash room, plaintiff and his wife went to the 8th floor. Plaintiff told his wife he thought Halvorson was in the Judge's chambers, so plaintiff and wife waited in the hallway on the 8th floor for a little while when the stairway door opened and Mr. Halvorson immediately said, as he came into the hallway and headed into the men's wash room on seeing plaintiff and wife in the hall, "The Judge is still reading it, he hasn't read it yet." On coming out of the men's wash room, he bee-lined for his office without looking around at all. Plaintiff followed toward his door and said: "You haven't this material in your office then and ready to mail with exception of affidavit and backing?" Mr. Halvorson said: "Did I say that? I've got the stamps here and I told you I'd have it ready for you by 1:00 o'clock." He went into Room 808, slammed and locked the door. At 1:02 o'clock we went back to Mr. Halvorson's office. Mr. Halvorson and Judge Lindberg's secretary were in the room. The secretary said: "Hello, Mr. Schaefer," and immediately left the room. Mr. Halvorson handed plaintiff the envelope with copies of transcripts (no stamps on envelope). Plaintiff pulled out a copy and did a little checking on that part of it of the 7th and asked Mr. Halvorson to read

certain lines on page 4 from his shorthand notes. His notes read to the same as the transcript (his notes were in a two-ring binder). Plaintiff said: "There's something wrong here." Halvorson immediately got up and, looking at the time, said: "I've got to go right now or I'll be late." Plaintiff asked him for his bill so he could pay him for the transcripts. Halvorson said: "I'll make it out and mail it to you at Portland." We then left his office at 1:13 o'clock p.m.

/s/ M. C. SCHAEFER.

Subscribed and sworn to before me, a Notary Public, this 22nd day of September, 1951.

[Seal] /s/ GOLDADA W. TOOKE,
Notary Public for Oregon.

My Commission expires June 11, 1954.

State of Oregon,
County of Multnomah—ss.

I, Gertrude Schaefer, being first duly sworn, say that I am the plaintiff's wife in the within-entitled affidavit, and that those parts of the foregoing statements beginning on page 1, line 31, to page 5, line 7, are true as I verily believe, with the exception of the following statements which took place on Friday, August 24th, starting on page 2, line 13. I did not hear the plaintiff's conversation with the elevator girl; plaintiff's conversation with Judge Lindberg's secretary, nor did I hear Mr. Halvorson's side of the telephone conversation.

/s/ GERTRUDE SCHAEFER.

Subscribed and sworn to before me this 22nd day of September, 1951.

[Seal] /s/ GOLDADA W. TOOKE,
Notary Public for Oregon.

My Commission expires June 11, 1954.

State of Oregon,
County of Multnomah—ss.

I, Goldada W. Tooke, being first duly sworn, say that I am the Mrs. Gilbert Tooke referred to in the within-entitled affidavit, and that the facts stated beginning on page 2, line 13, through page 3, line 25, are true as I verily believe, with the following exceptions: I did not hear the plaintiff's conversation with the elevator girl; plaintiff's conversation with Judge Lindberg's secretary, nor did I hear Mr. Halvorson's side of the telephone conversation.

/s/ GOLDADA W. TOOKE.

Subscribed and sworn to before me this 22nd day of September, 1951.

[Seal] /s/ F. C. HOWELL,
Notary Public for Oregon.

My Commission expires 5-20-53.

In the District Court of the United States for
the Western District of Washington, Northern
Division

Number 2673 (Civil)

M. C. SCHAEFER, an Individual,

Plaintiff,

vs.

SAM MACRI, DON MACRI and JOE MACRI,
Individuals, and W. R. McKELVY, and
CONTINENTAL CASUALTY COMPANY, a
Corporation; and A. J. GOERIG and CLYDE
PHILP, Individuals,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Before: The Honorable William J. Lindberg,
United States District Judge.

Re Motion of Defendants to Dismiss Second
Amended Complaint of Plaintiff

August 6, 1951

Appearances:

M. C. SCHAEFER, the Plaintiff,
Appeared in His Own Behalf; and

GRANVILLE EGAN, ESQ.,
Appeared on Behalf of Sam Macri, Don
Macri and Joe Macri, Defendants; and

MRS. ALTHA P. CURRY, of
SKEEL, McKELVY, HENKE, EVENSON
AND UHLMANN,

Appeared on Behalf of W. R. McKelvy,
Defendant; and

CARL E. CROSON, ESQ., of
CROSON, JOHNSON AND WHEELON,
Appeared on Behalf of Continental Cas-
ualty Company, a Corporation, Defend-
ant.

Whereupon, the following proceedings were had,
to wit:

The Court: In the matter of M. C. Schaefer vs.
Macri, et al.

Mr. Schaefer: I am ready, your Honor.

The Court: Are the Defendants?

Mrs. Curry: The Defendant McKelvy is ready.

Mr. Croson: The Defendant Continental Cas-
ualty Company is ready, your Honor.

Mr. Egan: The Defendants Macri are ready,
your Honor.

The Clerk: There is a motion to file a supple-
mental complaint. I don't know whether Counsel
for Defendants have the motion or not. The Court
has a copy.

Mr. Schaefer: I have given a copy to Defend-
ants' Counsel.

The Court: Mr. Schaefer, do you wish to make
a comment?

Mr. Schaefer: Yes. I am sorry that I haven't
been able to get this in sooner. I was somewhat

perplexed with the problem and method in which it should be submitted to the Court.

I would like to read this to the Court and I think it should be acted on before going into the motion to dismiss.

The Court: The Court has read this motion, it having been brought to the attention of the Court about ten (10) or fifteen (15) minutes ago. In substance, you are asking that authorization be [3*] given to amend your Complaint and also to file supplemental complaint to include another party.

Mr. Schaefer: That is right.

The Court: Well, the Court in a matter of this character—appreciating that the Plaintiff is acting as his own counsel—would not be disposed at this point to grant an amendment to the pleadings when the matter is set for argument.

However, in the interest of saving time, I am wondering if the Counsel for the Defendants here have any comments to make in regard to this matter?

Mr. Croson: May we have just a moment, your Honor? I want to see if other counsel agree with me in the matter.

The Court: Yes.

(Whereupon, Counsel for Defendants conferred briefly.)

The Court: The Court's thought is this: That if any time is to be saved ultimately in this matter by making provision for any other ruling, the Court

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

would be happy to hear from all parties before proceeding.

If you wish to consult further, you may.

Mr. Croson: If your Honor please, I am Carl Croson, and I represent the Continental Casualty Company. This is all new to me, just as new to me as to your Honor; in fact, I am five (5) minutes later in getting it than your Honor. I have had no opportunity to inquire into any of the matters set up in this motion.

Permission is requested to join an additional party and, [4] if your Honor should feel that there are sufficient grounds set forth in this motion—which is not accompanied in any way by an affidavit of fact—then we would prefer, of course, to have the entire matter set down for a hearing along with the other matter and argue the entire matter at one time.

I call to your Honor's attention that this motion is not supported by any affidavit of fact and there is nothing before your Honor that says anything except the motion, and this is what the pleader says:

The Court: The Court is aware of that, Mr. Croson, but, having in mind the circumstances wherein the Plaintiff is not represented by counsel, it places the matter in a somewhat different category than otherwise.

Now, the Court would make this suggestion: That this matter go over until this afternoon, at which time you might consider this development, if it is agreeable, unless you have other commitments that make it impossible. The Court has a naturalization

hearing at two (2:00) o'clock, which ought to be disposed of before three (3:00) o'clock.

The Court would be disposed to hear any comment at that time and might proceed with the argument on the motion to dismiss at three (3:00) o'clock having, by virtue of this new feature, to necessarily reduce the time of argument.

The Court would be disposed, unless you have some persuasive argument or comment to cause the Court to do otherwise, to put this matter over until three (3:00) o'clock and allow Plaintiff one (1) hour [5] for argument and the Defendants combined one (1) hour. I think, perhaps, I would hear first from the Defendants as to any argument they wish to make, or comment they wish to make, on this last pleading, this last motion.

Mrs. Curry: Your Honor, the matters alleged here, with respect to my client, Mr. McKelvy, are unfamiliar to me. But, be that as it may, I don't think it helps out his Complaint and I would be willing to consider all these as allegations in the Complaint, regardless of the fact that they are not verified, in order to dispose of it.

The Court: In order to bring it to issue?

Mrs. Curry: In order to bring it to issue and dispose of the thing once and for all.

We are hauled up here time and time again and I would like to get the matter disposed of at this time.

The Court: In other words, it would be your position—I will ask other counsel if they concur in this statement made by Mrs. Curry—it is your

position that you would stipulate that the matters, insofar as they constitute an amendment to the Complaint, set forth in the motion, or alleged motion, might be considered as being incorporated in the Complaint now on file, the Second Amended Complaint, and consider it as amended.

That would not bring Mr. Rask in as a party.

Mrs. Curry: And if your Honor should hold with us then he can bring a separate suit against Mr. Rask.

Mr. Schaefer: I think Mr. Rask is a party to this [6] conspiracy and if you wish to go ahead with the hearing on the motion, I will present more of the material on the conversation had with the man in the office and then I would ask that my request be granted and that I have whatever the law provides as to time for the serving of Mr. Rask and bringing him into the picture so that if this should go to the Circuit Court of Appeals that Mr. Rask is named and that the papers are properly in order.

Mr. Croson: May I make a suggestion?

The Court: Yes.

Mr. Croson: What would your Honor think of proceeding with the hearing? I am just as anxious as Mrs. Curry to get the matter heard. Then let your Honor consider the motion with this motion in front of your Honor. Perhaps your Honor does not care to rule on the motion to permit the additional Defendant on just the motion but to go ahead and hear these motions to dismiss now, having in mind that there may be a new party added.

I believe your Honor can, as Mrs. Curry said, on the Second Amended Complaint, pass on that now regardless of what is set up here. I don't think there is anything set up here that, if it were in the Complaint, would make one bit of difference except to bring in an additional party. There is nothing alleged in there that changes the situation insofar as any other party. That is why I made the suggestion that there is no affidavit of fact before your Honor.

I don't think it makes any difference, but I am perfectly willing that your Honor should have that in mind when you pass on it. [7]

The Court: I am wondering, in considering the stipulation—agreement—as to what is contained in here as being applicable to the Second Amended Complaint, if it would be safe in making that general stipulation without reading the matter. Do you get what I mean? When we say, in stipulating, that all applicable material in here may be considered as having been added to the Complaint. Is that general stipulation sufficient?

I am not speaking now as to whether or not that is in accordance with what you desire but, assuming we proceed on the theory that we are going to allow the motion to dismiss and accept this insofar as it will amend the allegations of the Complaint, will the general stipulation be sufficient? I will have to defer to Counsel in this matter, they being more familiar in that phase of it. Do you feel it is sufficient for your purpose?

Mr. Croson: I think it is.

The Court: Are you willing to proceed?

Mr. Croson: That is not——

The Court: That is not the Plaintiff's desire, I understand. Well, the Court is going to proceed, Mr. Schaefer, with hearing argument on the motion to dismiss.

It has been agreed to by Counsel for the Defendants that the allegations, insofar as they are proper and applicable, contained in your motion for order permitting filing of supplemental complaint as being amendatory of the Second Amended Complaint, may be considered and that the motion to dismiss will be argued on that basis. [8]

The Court at this time is not going to postpone or set over this matter for the purpose of filing supplemental complaint.

Mr. Schaefer: By that you mean, your Honor, that I will be permitted to present before the Court here then the additional material that I have on the conversation—relative to the conversation—had down at my office, so that all the material then will be in the file in case this thing goes to the Circuit Court of Appeals?

The Court: This matter being before the Court on an argument for motion to dismiss, your statement as to the conversation—that is evidentiary matter which would not properly be part of argument on the allegations of the complaint on the motion to dismiss.

But, any argument you may make, the Court Reporter will take, and the record will show what comments you are making in argument.

I think the effect of the Court's ruling is this, Mr. Schaefer: The Court is not granting leave at this time to file a new complaint, an amended complaint or supplemental complaint, as is indicated in your request, but, by stipulation of counsel, that material in this motion which might be amendatory of the Complaint is, by stipulation, being made a part of the record so that insofar as it could amend your existing Complaint it is being made applicable, but the Court is not permitting a new complaint to be filed at this time which would bring in a new party, namely, B. J. Rask, as an additional defendant.

Mr. Schaefer: Would that preclude the possibility of [9] bringing Mr. Rask into the picture at a later date? I feel he is a party that should be named in this conspiracy.

The Court: It would depend, Mr. Schaefer, in part on what would happen as a result of this motion. If you have an independent action, if you have an action which will include that, which would include Mr. Rask, the Court would not undertake to say whether you might be legally entitled to bring another action or not.

Mr. Schaefer: I think that he was instructed and had information from the present parties, before I requested him to become a party, of the facts of this suit sufficient to come down there and make the threats that he did and he evidenced that fairly clearly after we got in the conversation in a few minutes, and I think there is somebody, there is either one or more of the present Defendants, that

have given him the information and so instructed him to do, and I don't see why he should not be made and included as a party.

This thing isn't yet in there for argument, but it is in there for—that is, the issues really haven't been joined, I don't believe.

The Court: The Court is attempting to be reasonable and realizes you are without counsel but, of course, the Court can not completely disregard rules of procedure and the Court feels that it is only reasonable in this matter to proceed on the motion to dismiss, particularly with Counsel being willing to stipulate as to these facts insofar as they are proper and applicable being included in the Second Amended Complaint. [10]

Do the parties—Counsel—feel that there is sufficient preliminary record made to warrant going ahead?

Mr. Croson: Yes, your Honor.

The Court: Then the Court will proceed to hear argument, hearing the Defendant first, Mr. Schaefer.

Mr. Schaefer: Yes.

The Court: The Court will recess at a quarter to twelve (11:45), and then, because of naturalization proceedings, this matter will have to go over until three (3:00) o'clock.

So, what arrangements have Defendants made for time?

Mr. Croson: If your Honor please, I have made a digest of the Complaint and I believe it is satisfactory to the other counsel if I proceed with that analysis of the Complaint, which appears to be the

real question before your Honor, this case having been passed on by Judge Lemmon and the trial court that heard the matter in the beginning in District Court, and it would seem to me that it might be helpful to your Honor to see in what particulars, if any, this Second Amended Complaint differs from the two preceding complaints.

Your Honor is not bound by any decision made by the other Judges, of course, but it looked to me like it might be helpful if your Honor had before you what, if any, new material we have in this Second Amended Complaint that was not in the preceding complaints.

I understood from a young man in our office, Mr. Hatch, that that was somewhat in your Honor's mind at the time this hearing was set, so that I am prepared to meet that situation. [11]

As I understand now, there is one (1) hour for the combined three (3) Defendants?

The Court: Well, we permitted one and a half (1½) hours to begin with. That was the understanding several weeks ago when we set the date. Now you may have until a quarter to twelve (11:45). You may have one and a quarter (1¼) hours.

Mr. Croson: Now, if your Honor please, the law of conspiracy is very simple and I am starting out with the assumption that all parties have the law clearly in mind.

In the first place, there is no such thing as an act of conspiracy. It is merely that thing which may bring parties together in such a position that any

one of the parties involved may be guilty of a tort which may be committed by any one of them.

The action is a tort action and, as far as a conspiracy is concerned, it is nothing but saying how many people are responsible for that tort.

The old stock definition that we learned in law school, all of us, is that it is doing an unlawful act, or doing a lawful act for an unlawful purpose.

So, we start out with that thought in mind, as we have done in the preceding arguments. Now, the first Complaint was passed on by Judge Lemmon and advice was given. I don't know whether your Honor has seen the record, but Judge Lemmon's remarks are in the record and he gave Plaintiff plenty of advice as to how he should have to plead in order to plead a case of conspiracy. [12]

The amended complaint came in and in that amended complaint there were various allegations. Conclusions of law were liberally pleaded throughout the pleadings, together with testimony, and that again was passed on after argument and again suggestions were made to the Plaintiff as to how he would have to plead.

He comes in then with the Second Amended Complaint and I represent the bonding company, and I will direct my remarks to the bonding company, but what I am suggesting to your Honor now is applicable to the Complaint for all parties concerned.

I hope that this may be of some help to your Honor, and I passed counsel an analysis of the Second Amended Complaint and I am passing up to your Honor, as sort of a guide, what we have

prepared in trying to analyze this rather voluminous document which consists now of allegations which combine statements of fact and conclusions of law. Practically the same thing is within the amended complaint except now it is segregated and made exhibits and they are now pleaded as exhibits, taking that out which, apparently which, was included before as a part of the pleadings.

Now, analyzing the Second Amended Complaint with the analysis that I have given your Honor.

Paragraph I of the Second Amended Complaint is the same in both the preceding complaints.

Paragraph II we have taken line by line and analyzed that, and in the Second Amended Complaint we have lines 21 to 24 as a new allegation. Not new facts entirely, but it is a new [13] allegation.

I am going to try to present to your Honor all the places in this complaint that the Continental Casualty Company is mentioned as a conspirator and mentioned as a party Defendant.

“The Defendant Continental Casualty Company, a corporation, was engaged in the business of issuing bonds guaranteeing performance of contractual obligations and payment to laborers and material men supplying work or materials to general contractors.” Now, that is new material as contained in paragraph II of the Second Amended Complaint. It is a new statement.

I will again comment on that as we go to the new material to see if it has added anything.

“Continental Casualty Company, a corporation,

was engaged in the business of issuing bonds guaranteeing performance of contractual obligations and payment to laborers and material men supplying work or materials to general contractors.”

Now, that particular language, as pleaded, is, of course, the pleader’s own language. That will become material as we come to the conclusion of the Complaint because that is not quite the position, I believe, that has been taken by the Plaintiff heretofore in connection with litigation pertaining to this matter.

Following down paragraph II: “that the defendant Clyde Philp was the agent and attorney in fact in the State of Washington for said Continental Casualty Company; that said defendant Clyde Philp also was a partner with the defendant A. J. Goerig; and said Philp and Goerig were silent joint venturers with the defendants Sam [14] Macri, Don Macri and Joe Macri . . . ”

The Court: You are representing both Continental and the——

Mr. Croson: No, I do not. Our interests are entirely adverse in this suit. Our interests are adverse to all parties because, as a matter of fact, as to Continental Casualty Company, judgment was entered in which Continental Casualty Company had to pay the judgment with the other parties being unable to respond, as the pleadings——

The Court: Just so that the Court may be clear: Is anyone representing Goerig and Philp?

Mr. Croson: No. As far as I know, they are not represented. No judgment was granted against

them in the lower court but they are named as parties here but are not represented.

Mr. Schaefer: Your Honor, we were unable to get service on them.

Mr. Croson: That is the answer. I didn't know.

Those are the two places that the Continental Casualty Company is mentioned as far as that page is concerned.

At the top of the next page we have Continental Casualty Company under the statement that Mr. McKelvy was the attorney for Continental Casualty Company.

Now, following on down to paragraph III, we have this statement:

“ . . . and on the same day the defendant Continental Casualty Company issued its performance bond and its payment bond [15] protecting the United States and, among others, this Plaintiff, which said bonds were duly signed and sealed by the defendant Clyde Philp as attorney in fact for Continental Casualty Company . . . ”

Now this plaintiff, as the plaintiff now appears, is appearing before your Honor as one who has won a case in the District Court where he was granted judgment for time and materials and that judgment has been paid. That is the original suit in which he brought action against these parties and was heard in the District Court at Yakima. Judgment was entered and Continental Casualty Company has paid that judgment. So that this is not a suit for time and material. It is a conspiracy suit for some sort of a tort that may have been committed by

these parties. That is all we are looking for now.

It is not a question of was their liability of these parties but, have these parties created a new liability to the Defendant—to the Plaintiff—by reason of subsequent actions. I take it that any action which had been committed prior to the time that that suit was heard will, when that time comes up, be considered as having been merged with the judgment at the time when all the parties were before the Court and the Court heard it.

That is not, of course, in this case right at the moment because of the fact that ours is a motion to dismiss the Complaint as set up, but, from these files set forth, we are able to get the factual situation as I have given your Honor.

A judgment has been entered.

Continental Casualty Company has paid. [16]

Paragraph III speaks of having entered this performance bond for the payment of labor and materials and that is not before your Honor now.

Then we move on for the next new material which we find in—and for the place where Continental Casualty Company is named—paragraph VI, which says:

“That defendants and each of them wilfully, maliciously and with deliberate intent to injure, damage, and defraud the plaintiff in his performance of said sub-contract and otherwise did unlawfully and in accordance with a preconceived plan confederate together, combine, conspire and agree to cause plaintiff to become financially bankrupt, to cause plaintiff to lose his said business and its

assets, to ruin plaintiff's business and personal reputation and credit. In furtherance of said wilful, intentional conspiracy as aforesaid, defendants engaged in a series of tortious acts continuing from the inception of work by the plaintiff under said sub-contract dated March 15, 1944, to and including August 18, 1950, said acts consisting in principal part, of the following":

From there on I take it that the purpose of the Complaint is to allege the conspiracy of which he is complaining.

Now we have the same general conclusion as set forth in paragraph VI—we have the introductory paragraph—we have that same general allegation in both the preceding pleadings and I take it that nothing has been added to this conclusion that is pleaded—no factual matter so far. [17]

Now "A." I take it that this is to set out the tortious act that is ground for action against all parties.

"The defendants Macri in furtherance of said conspiracy wilfully and intentionally failed and refused to do that portion of the work which under the terms of the agreement between the said Macris and the plaintiff were to be done by said Macris prior to the work to be done by plaintiff."

Continental Casualty Company isn't involved in that.

" . . . wilfully failing and refusing to make the excavations in a proper manner, wilfully failing and refusing to do the grading in a proper manner and wilfully failing and refusing to furnish the

kind, quantity and quality of lumber required to be furnished by them as a condition precedent to the performance of plaintiff's portion of the work . . ."

Continental Casualty Company isn't involved in that at all.

He said:

" . . . all designed and intended to and in fact causing plaintiff considerable unnecessary delay . . ."

That was presented to the Court in the hearing of this case in the District Court hearing.

Now, the last line:

" . . . said acts were the acts not only of said defendants Macri but also their silent joint venturers Philp and Goerig and the said Continental Casualty Company." [18]

Now, it is not true, and it is not set out in the many exhibits to this Complaint that Continental Casualty Company undertook in any way to do or perform the contract. They gave the bond for payment of labor and materials but not as a party to a contract for the performance thereof.

So that this conclusion is entirely erroneous to even the facts—the facts that are set forth here in his paragraph VI.

Now:

"On or about the 15th day of July, 1944, in furtherance of said conspiracy, defendants Philp and Goerig and said Macris entered into an alleged Agreement (copy attached as Exhibit B, and by this reference thereto made a part hereof, as though set out herein in full), terminating said venture agreement of December 11, 1943."

Now that brings in the fact that while Philp and Goerig were joint parties in the venture prior to this date of July 15, 1944, at that time the joint venture was dissolved.

That was handled by the trial judge at the time of the trial and the rights of the parties were adjudged therein.

Now, this next allegation: It is a new sentence and a new allegation:

“Said alleged termination agreement was fictitious and was executed solely to confuse the facts and deprive plaintiff of a cause of suit or action against Philp and Goerig.”

I don't think this adds anything to the Complaint, a complaint in conspiracy for a tortious act. There is nothing tortious about [19] the arrangements the parties might make between themselves and the Court found that certain liabilities were gained up to that time and the Court held the parties liable for that.

So:

“... on or about the 1st day of November, 1944, the defendant McKelvy became a co-conspirator with the aforementioned defendants...”

Now we have then this situation. We have some kind of an agreement. If we have any agreement we would have had to have had an agreement prior to that time and where is there any agreement of any kind which is pleaded that would bring parties in to make a tortious agreement?

This brings McKelvy in as a co-conspirator on

the 1st day of November, 1944. He has pleaded acts prior to that time.

When did the agreement take place that would make that tortious act, if any there be, an action against Macris, an action against McKelvy, and Philp and Goerig? Where is there anything that shows any agreement that makes Continental Casualty Company a party to an agreement?

In Number C, now, they bring McKelvy in as of November 1, 1944. As of November 1, 1944, he became a conspirator.

“... on that date plaintiff employed said defendant McKelvy and the said defendant McKelvy accepted employment by plaintiff as his attorney to terminate said sub-contract dated March 15, 1944, on account of the breaches by said Macris and to sue said Macris [20] and Continental Casualty Company for the reasonable value of the work done to the date of termination, and also to terminate a second sub-contract with said Macris under job specification 1068, dated April 21st, 1944, under which no work had been done by either plaintiff or said Macris as of that time.”

He said:

“Plaintiff at that time made full disclosure to said defendant McKelvy . . . ”

And then he pleads the rest of that VI C, and his complaint is again what he alleged McKelvy did not do.

Finally he ends up with this—running through that whole “D.” He comes to this conclusion on page 8:

“That all the aforesaid acts and omissions by the defendant McKelvy were done intentionally and knowingly and as part of and in furtherance of the original conspiracy by the other defendants, and were designed and intended first to cause plaintiff to become bankrupt if possible, and secondly to cause plaintiff to be disgraced and disqualified in his personal and business reputation and credit, if he followed the advice given by defendant McKelvy, and that the aforesaid acts and omissions by the defendant McKelvy were part of a deliberate attempt to lead the plaintiff on through intentional stalls and delays to the point where plaintiff would be powerless to sue the said Macris because of the running of the statute of limitations; all of which was prevented only by the diligence of plaintiff; and that all of said acts were done knowingly, wilfully and intentionally in concert with the [21] other defendants and contrary to and against the interests of plaintiff, and as part of the aforesaid conspiracy.”

Now, if your Honor please, there is nothing new that can be claimed as far as these pleadings are concerned with paragraph VI except lines 26 and 27 on page 3, which is nothing but a conclusion, and then lines 7 to 9 on page 4, and on page 9 we have the conclusions pleaded.

Nothing at all new except as we find it in—well, no, that comes down in “F,” on this same page.

Now, take “E”:

“Shortly after the 20th of October, 1945, plaintiff then retained the services of an attorney in Yakima,

Washington, who promptly investigated the facts and then accepted the employment which Mr. McKelvy had originally accepted, and on or about the 1st of December, 1945, made a written demand upon the defendants Macri for the payment of sums allegedly due the plaintiff for the performance of work under the sub-contract . . .”

And that notice was given that if they didn't pay up, why, suit would be started immediately.

“F”:

“In furtherance of the conspiracy, said defendants and each of them caused a suit to be filed in the Circuit Court of the State of Oregon for the County of Multnomah on the 14th of December, 1945, copy of the complaint and summons wherein are attached as Exhibit J, and by this reference made a part hereof as though set out [22] herein in full, wherein the defendants Macri alleged that they had suffered damages in the amount of \$40,000.00 by virtue of plaintiff's alleged breach of said second sub-contract dated April 21, 1944 . . . ”

Well, then, he tells us that that suit was dismissed and it came over and was consolidated for hearing as a cross-complaint in the case held at Yakima.

Now the last place that Continental Casualty Company—all through this Continental Casualty Company is not mentioned—in all this matter they are not mentioned except as to the defendants. On page 10, paragraph K (G), he says:

“Continental Casualty Company then brought to plaintiff's attention for the first time (by contacting

plaintiff's attorney Olson) . . . copy of letter attached as Exhibit L . . ."

They brought to the attention of plaintiff's attorney "the fact that the defendants Philp and Goerig were silent joint venturers with the defendants Macri and asked that the complaint be amended so as to name said defendants Philp and Goerig as additional parties defendant, which plaintiff did."

Continental Casualty Company furnished the information to the attorney for Mr. Schaefer that Goerig and Philp were joint venturers with the Macris. Apparently a fact which the attorney for plaintiff did not know, and then they were joined.

If that is an act of conspiracy—well, I would say it is an act of courtesy that the Continental Casualty Company notified the plaintiff's attorney that these other parties should be named to an [23] action of the kind brought in the Federal District Court at Yakima.

Then he alleges that the,

"* * * suit in the Federal District Court in Yakima was tried on the merits and finally resulted in a judgment in favor of plaintiff and against the defendants Macri, Philp and Goerig, and Continental Casualty Company, for what the trial court thought was the reasonable value of the services rendered by plaintiff under the contract dated March 15, 1944, and as part of the decision in that suit the subject matter of the aforesaid suit filed in Multnomah County, Oregon, on December 14, 1945, (which, after much inconvenience, plaintiff suc-

ceeded in having dismissed and which later became the subject of a cross-complaint and counter-claim by defendants against plaintiff in said suit filed in Yakima, Washington) resulted in adjudgment in favor of plaintiff, and plaintiff was awarded nominal damages. Copy of the memorandum opinion of the trial judge and the judgment in said suit in Yakima are attached hereto as Exhibits M and N, and by this reference made a part hereof as though set out herein in full.”

To which I will refer as a part of the pleadings here in setting forth this complaint which is now before your Honor.

Now, “H”:

“Said conspiracy was thereafter furthered by defendants Philp and Goerig, the Macris and Continental Casualty Company in the following particulars * * *”

In the first place, there is nothing, in my opinion, that sets forth an original agreement, or plan, or scheme, or device which [24] these parties can be charged with.

Secondly, there is nothing that is added to it by McKelvy’s coming into the picture.

And third, I don’t think that grounds of conspiracy have been set forth up to this point.

Lastly, “H”:

“Said conspiracy was thereafter * * *”

The Court: Excuse me. The Court will now have to interrupt you. Court will stand at recess in this matter until 3.00 p.m. this afternoon.

(Whereupon, at 11.45 o'clock a.m. a recess was had in the within-entitled and numbered cause until 3:00 o'clock p.m., August 6, 1951, at which time, counsel heretofore noted being present, the following proceedings were had, to wit:) [25]

Mr. Croson: May it please the Court?

The Court: You may proceed.

Mr. Croson: If your Honor please, I am calling your Honor's attention to page 11, paragraph "H." Your Honor has caught the theory that this Complaint is drawn on, that there is set forth a series of events. I presume that is to overcome an objection which Judge Lemmon pointed out to Plaintiff with respect to the statute of limitations and, apparently, this is an effort to bring some actionable action by the parties within the statute.

However, I think even that fails completely.

Now, paragraph "H" says:

"Said conspiracy was thereafter furthered by defendants Philp and Goerig, the Macris and Continental Casualty Company in the following particulars, to wit:

"1. Continental Casualty Company led the way in the appeals of the trial court judgment and protected defendants Macri from being precluded from appealing."

Then, dropping to line 11:

"On May 20, 1947, Continental Casualty Company filed its notice of appeal and on July 29, 1947, Goerig and Philp filed their notice of appeal. Not

until August 18, 1947, did said Macris file their notice of appeal * * *

Apparently the effort is, by some process of reasoning, to feel that by reason of Continental Casualty Company having filed its [26] notice of appeal—motion for new trial on May 9, 1947—that that action was a protection to what otherwise might have been a delayed action on the part of Macris, and I wish to call your Honor's attention to this: that during this entire "H," all the way through, there is just an objection made to the actions taken by Continental Casualty Company in connection with their motion for new trial, with writ of certiorari, and with the court procedure subsequent to the judgment in the District Court.

That is all "H" is. I will refer to it later.

Now, in "I":

By the way, on that page, page 12, lines 10 to 13, in the memoranda I have given to your Honor, it is a new conclusion, new statement:

"All of said acts of separately appealing and delaying were done in furtherance of said conspiracy and were intended to bankrupt plaintiff and preclude his continuing prosecution of the case; and defendants nearly succeeded."

That, of course, was after judgment had been entered by Judge Driver over in Spokane, and all of these alleged—this alleged—misconduct took place after that.

Now, finally, "I," or "I":

"Finally, on or about the 9th of November, 1949, the draft issued by Continental Casualty Company

in payment of the trial court judgment was delivered to plaintiff, but even then and in furtherance of the aforesaid conspiracy, language was intentionally [27] included on the reverse of the draft immediately prior to the space for endorsement, intended to have the effect * * *” and so on.

Then, at the end of the paragraph:

“Neither Philp nor Goerig nor the Macris have yet paid to Continental Casualty Company the judgments obtained by Continental Casualty Company against them in plaintiff’s suit in Yakima * * *.”

Now, paragraph “J” is—paragraph “J”—the only place Continental is mentioned there is in lines 3 and 4, page 13:

“* * * Continental Casualty Company’s appeal bond covered damages from delays on appeal * * *”

And that his counsel was advising Continental Casualty Company that any delays on appeal might result in damages against them for delaying.

Now, I wish also to call attention to paragraph VII:

“That by reason of the premises aforesaid and all of the acts and omissions of defendants and each of them in furtherance of their aforesaid preconceived and concerted plan and conspiracy and as the direct and proximate result thereof, plaintiff for several years thereafter had no personal credit * * *”

Now then, he claims damages for affecting:

“* * * perfecting, developing and marketing certain inventions relating to improvements in tools and methods used in the concrete and construction

business, all of which would otherwise have been perfected and marketed at a substantial profit to plaintiff, all to plaintiff's damage in the sum of one million (\$1,000,000.00) dollars." [28]

Now, let us turn to Exhibit M attached to the Complaint. I will be very brief with this. On page 6 of Exhibit M, these are the words, now, of Judge Driver in respect to—well, in a statement of his understanding of the case and how he was about to decide it as he gave that statement preliminary to counsel:

"Now, coming to the law applicable to this situation * * *"

The last paragraph in the middle of the page.

"It is of course difficult, and I am frank to say I think that the case cited by Mr. Ivy * * *"

Who was then representing Continental Casualty Company.

"* * * United States vs. John A. Johnson and Sons, (2458) 65 F. Supp. page 527, if it were followed, would preclude recovery by Mr. Schaefer, at least against the bonding company."

Now, also turning to page 10. I am not trying to read all of this because of the time involved, but, page 10, beginning at line 20:

"Certainly the rule is that a bonding company which has a performance bond for a main contractor is not bound, to its detriment, by the provisions of the subcontract as to the price of the work to be performed. If a general contractor makes a subcontract to do a part of the work for twice its reasonable value, the bonding company isn't bound

by that contract and, conversely, it seems to me they should not be able to claim the price in the sub-contract to their benefit * * *

“We have a close question of law and we have a nice [29] question of fact.”

There was testimony and Judge Driver found that \$57,815.87 would be the proper amount. He allowed no interest until date judgment was entered but all the time after that there was interest paid to this plaintiff on that judgment while the appeals were going on.

Now, let's look at page 13 again in the same Exhibit M.

“As to Goerig and Philp's liability to Schaefer, and while it might seem at first blush that that is unimportant, I think that it might very well be, because this is a close case, and these questions are close and in some respects novel ones; and if the appellate court should hold that the bonding company are not liable, then I think the question of whether Goerig and Philp are bound would be important.”

He was looking after plaintiff's interest quite completely in giving him judgment against them in the event the Appellate Court should reverse his ruling that the bonding company was liable.

Your Honor does not need to look further than that statement in Judge Driver's statement to see that there were appealable issues. He says they were “novel” and “close.”

To sum up my presentation, I have given your

Honor, for what it may be worth, our analysis of this Complaint compared to both the others.

I am safe in saying this to your Honor, that I don't believe that there is any new factual matter pleaded which in any way changes the position of the case as it was heard before Judge Lemmon and [30] before Judge Driver.

Now, this is a matter of record in the case. I am reading from page 44 of the transcript of Judge Lemmon's hearing, and he is speaking these words to Mr. Schaefer.

The Court: What page is that?

Mr. Croson: Page 44 of that transcript, the last full paragraph on that page.

The Court: I have it.

Mr. Croson: "In granting the Motion, I would also grant you time within which to file an amended Complaint, if you can, setting forth and overcoming this question of the plea of the Statute of Limitations. If you did that, you should go into your Complaint and set forth, first, the agreement between the parties—the unlawful agreement—when it was entered into and what were the terms of that agreement; what did these Defendants agree to do—and then set forth what they did in furtherance and in carrying out that agreement; and then you should allege from that the damages with connection between the act done or the acts done and the damage."

Now, nothing could be more kind. I don't know that I have ever been in Court where the judges

have been more kind than they have been to this plaintiff and have given him more directions as to how to stay in court.

The same thing occurred with Judge Driver. Judge Driver's comments I will leave to other counsel to present. They are also matters of [31] record.

Now, summing up my position:

As far as Continental Casualty Company is concerned, it is my position that there is no allegation in words that Continental Casualty Company entered into an agreement as to what was to be done for a given purpose.

Continental Casualty Company doesn't come into the picture until after there has been a grievance between the Plaintiff and the Macris. The Court found that to be justified so that I accept that. The Macris had not fulfilled its part of the agreement and the plaintiff did and then claimed that he had work which he was entitled to payment for on a quantum meruit basis and on that basis he was awarded the amount which the Court found to be due him for material and labor.

They paid. That is what the bonding company was there to do and that is what they did when it was determined. There were nice questions in there and in determining those questions, it takes only the word of the Judge who tried the case to satisfy your Honor that there were appealable grounds and that Continental Casualty Company had a right to take its appeal, which it did, and when it was found against them, they paid the judgment.

So far as Mr. McKelvy and the Macris are concerned, it will be my position that my analysis will be of aid to you.

My position is:

Number one, there is no cause of action so far as Continental Casualty Company is concerned.

Two, that the statute of limitations applies. I believe [32] that that is the case. I am sure your Honor has that record there. There is the case, 100 Fed. 2d 184, on the statute of limitations, Mitchell v. Greenough. I am sure you have it in the record.

Thank you for your attention.

Mrs. Curry: I appear for the Defendant, W. R. McKelvy.

There is no need for reiterating the allegations of the Complaint. I think the Court read it and Mr. Croson carefully analyzed it in regard to the previous complaints.

The only difference I can see in the two complaints is that he took some of the stuff out and put them in as exhibits.

What the conspiracy is: There must be a conspiracy to accomplish some purpose. He doesn't seem to make up his mind what the conspiracy is to do. He has gone into the injuring, damaging and defrauding him in the performance of the sub-contract. He admits that McKelvy didn't know anything about that until he engaged him in 1944.

Number two, he accuses all of us of confederating to bankrupt him and ruin his business and reputation and credit.

Then he has a third conspiracy and that was to defeat the law suit which he sought in Yakima.

The judgment in that law suit was for some fifty-seven thousand dollars and costs and the draft that paid it was \$66,306.48.

The fourth conspiracy was to prevent him from bringing this law suit. [33]

Those are the points he has stated in this law suit.

All that happened was he had a contract with Macris and got in a row with them. The other proceedings show he was covered by Glen Falls, the bondsmen. They were clients of our office and they were sent into our office by them.

He alleges he engaged McKelvy to bring a law suit and that McKelvy agreed to do it and started him along until October, 1945, when he woke up to the fact that he wasn't getting service and demanded to know how long he had before the statute of limitations would run and he was told one (1) month.

However, Judge Driver said if the conspiracy was to prevent the law suit, he was certainly a bungling conspirator.

He admits in the record that he went over to Yakima and engaged Mr. Olson who won his law suit. He was told by our office, and that is true, that our office could not represent him in a suit against Continental Casualty Company because Continental Casualty Company has been a client of ours for some time. That part is true. There is no question about that. But, so far as what Mr. McKelvy did, even the statement—and it is hard to take these

statements and argue the proof of them when some of them, we know, are untrue, but, he says that McKelvy said he would bring the law suit, and he tells of a little memorandum that McKelvy had written to Mr. Kelley in which Kelley looked up some law and saw there was a possibility of quantum meruit.

That memorandum states Mr. McKelvy's word that: "Schaefer insists that he must collect or go broke." [34]

Apparently when the file came back, why, Mr. Schaefer found this little memorandum in it. It was just an office memo which showed there was work on it as to his rights. Then there is an allegation, I don't understand it, about the Macris not being broke but a kid's stealing money and the kid didn't. That is all involving McKelvy except the last where McKelvy stopped off and asked him to pay his bill and that act is alleged in the Complaint. Those are the only allegations against McKelvy, and the services were terminated in October, 1945, and the statute of limitations would run for certainly two years against a conspiracy.

With reference to the law applicable, we have two rather famous cases in this jurisdiction of several years ago. Ransom vs. Dollar Steamship and Ransom vs. Matson Navigation Company.

Ransom was a movie actress who sued everybody. She started out with suits against Matson Navigation Company, 1 Fed. Supp. 244. She says she was shanghaied into a port by Matson Company and then by the Dollar Company and that then she was

put in the insane ward and then she had the Traveller's Society mixed up in it.

The third amended complaint was thrown out in 2 Fed. Supp. 409. Judge Neterer said:*

“A conspiracy has to do with things to be brought about, and is a stranger to things which have passed. The steamship lines are distinct entities, as are, likewise, the defendant persons. There is no statement of any collusive act or circumstance to plaintiff's voyage on the Malolo from Honolulu to Yokahama, which would lead to [35] a conclusion of collusion, confederation, cooperation, or conspiracy to do the acts charged.”

If each of these people did something differently and if she had any law suit, it would be against the Matson Company for assault and against the Dollar Steamship Company for assault and against the Lancaster for libel, and so on. But, there was no agreement.

“The mere statement that the parties conspired, or that there was conspiracy, is not enough. The stated conclusion must be predicated upon facts or circumstances showing that there was collusion, confederation, cooperation and related acts between the parties to carry out conjointly the unlawful enterprise, each to do necessary acts to effect the joint enterprise.”

There is nothing in this Complaint that brings any of these parties together. In our argument last time Mr. Schaefer said, why, there were circum-

(*1 Fed. Supp. 244.)

stances and, as Judge Driver said, extremely circumstantial, but circumstantial evidence to support an allegation must be based on facts so clearly that it is incompetent with any other inference and there are no facts alleged in this case that are so strong as to impel the inference that any of these people confederated to do any of the acts done, and all of them are lawful acts.

Conspiracy is simply a civil action. Conspiracy is to do an unlawful act or do a lawful act to accomplish an unlawful purpose.

You must have in this Complaint allegations of an unlawful purpose. It may be done by lawful acts but for an unlawful purpose, [36] or, you must have allegations of unlawful acts to accomplish a lawful purpose.

There must be interference with a right. There is not an allegation of any unlawful act or any unlawful purpose. There is nothing in here that leaves an inference that is consistent with any other inference that they confederated for any purpose and, as I say, there is no unlawful act or purpose.

One of the best cases in this jurisdiction was the decision by Judge Neterer, 2 Fed. 2d 491, Puget Sound Power and Light Co. vs. Asia, et al. There both sides were represented by eminent counsel in this jurisdiction and this is one of the many cases that involves the bonds of the Puget Sound Company and the row with the City, and Judge Neterer dismissed the complaint because he said there was no unlawful act or purpose alleged, and he said:

“Simple conspiracy is not actionable. Malice or unlawful or fraudulent act is the gist of the action, conspiracy being only matter of aggravation or inducement, and an allegation of conspiracy is not sufficient to sustain an action where no direct fraud is charged. The right of recovery is predicated upon wrong threatened or accomplished, and while the conspiracy may be charged and proved as a matter of aggravation, the recovery is upon the tort. To sustain a tort action, the outgrowth of conspiracy, to impair a contract, acts must be averred which show concurrence of fraud and damage.

“Malice being the gravamen of the offense, it is not enough to say that the act of the defendants is malicious, but the matter [37] of the grievance must be specially set forth to challenge the attention of the chancellor.

“The only act charged against defendant is the bringing of an action in the state court, a court of competent jurisdiction. This was lawful. Fancying they had a grievance and claiming a right in themselves, they had a right to sue, and having a right to sue the law does not inquire into the motives.

“A court will not presume that a court of competent jurisdiction will permit itself to be made the instrumentality through which an unlawful purpose may be accomplished.”

Judge Driver said they would have been lax in their duty if they did not defend that action.

Another case in California is *Lynch v. Rheinschild, et al.*, 195 Pacific 2d 448. That involved a

claim that they were not including certain assets. That was also pro se; the man didn't have a lawyer. The court said:

“In the present complaint there is a total absence of any allegation of any unlawful act or an injurious act by unlawful means.

“Motion for dismissal must be granted.”

Then the Third Circuit. I wanted to get a recent case, *Black and Yates, Inc., et al., v. Mahogany Association, Inc., et al.*, 129 Fed. 2d 227. I comment——

The Court: Is that in your memorandum? Is that in your memorandum?

Mrs. Curry: Yes. That involved a row over the [38] Philippine Mahogany Association and the regular American Mahogany people, and the judge uses rather, well, interesting language.

There is not a single act in here that McKelvy committed that is unlawful. That is not a single purpose of any of the group, if they had combined, that was unlawful. They had a right, with the exception of Macri's breaching his contract. The remedy was had by Mr. Schaefer when he collected some 66 thousand dollars in that lawsuit which we had no part of.

Now the combination must have a meeting of the minds and, as said in *Asby vs. Peters*, there must be an actual meeting of the minds. Judge Neterer said there must be a tacit understanding and, as Judge Driver said, it doesn't mean that the parties must sit down at a table but there has to be a common purpose and an agreement.

Now there has been a great deal of argument in the Court as to whether an act, legal by an individual, can become illegal if done by a group of persons and I am of the opinion that Washington has adopted the rule that conspiracy can not exist—a person can not be guilty—if it is legal for the individual.

Another fault of this complaint is that no damage is alleged. As I said, you must have a claim of the damage and the act and there is no damage alleged in this case flowing from any act.

Mr. Schaefer alleged that he had a lot of trouble bringing the lawsuit, but he won and collected his judgment. He alleges that McKelvy delayed him and that suit was brought down in Portland, but that suit was dismissed and it was made a part of the litigation in [39] Yakima. He says there was conspiracy to prevent him bringing this lawsuit, but he brought it.

He alleges that he was—that his credit was—interfered with, but he doesn't allege how. He alleges that they have tried to make him bankrupt, but he didn't go through bankruptcy.

I think that is about all that he complains of. He says he was unable to profit on some inventions and, of course, that wouldn't make any difference under any circumstances because it would be highly conjectural.

I would like, if the Court will permit, to refer to Judge Driver's comments on the last argument. Judge Driver, you will remember, was the Judge who sat in the Yakima case. A very vicious thing

in this Complaint is that Mr. Schaefer insists that Mr. Willard Skeel of our office ever appeared in the Schaefer case in Yakima and that is absolutely false. In the transcript of the Schaefer case that went to the Circuit Court as an exhibit is this portion of the proceedings held on February 21st, which were the cases involving other parties in which Mr. Schaefer was not a part. I think five were consolidated for trial. They were tried in Yakima and mainly disposed of by pre-trial conference. But a portion of that testimony of Mr. Goerig and Philp was transposed into the Schaefer case and that part of the testimony of those cases, of which Mr. Schaefer was not a party, did refer to Willard Skeel as being attorney for Continental Casualty Company. It is true that he was over there representing in four or five or six cases Continental Casualty Company but in none of those was Mr. [40] Schaefer a party, but the testimony of part of it was pertinent and it was transferred and no one in our office appeared in that case.

On page 60, Judge Driver says:

“I’m just trying to visualize in my own mind what you claim this conspiracy was. I recognize the fact that you don’t have to prove that the defendants got together and made an agreement as people do if they’re selling horses or renting real estate, that a conspiracy is a sort of a back-alley basement affair, usually, and can be proven by circumstantial evidence, but you have to show either directly or circumstantially that there was an agreement between them, an unlawful agreement to do

something to damage you here. Now, it's your position that Macri failed to comply with his part of the contract and was slow in doing it in order to injure you by causing you to become bankrupt?"

And he said, "Yes."

That is what I meant by an agreement. You can prove it by circumstantial evidence but the circumstances must be such that the inference is so strong that it is inconsistent with anything else, and there is no allegation in this Complaint that would lead to an inference that these parties conspired together.

Then, on page 62, Mr. Schaefer was saying that he was attempting, upon circumstantial evidence, and the Court said:

"Extremely circumstantial, I should say. Is it your position that after you went to see McKelvy and tried to get him to represent you, that he went then and talked to Continental and Macri [41] and got into this scheme to ruin you and entered it and became a part of it then?"

And he didn't answer that question.

"I claim that it was he, that by not bringing this suit as he had agreed to do in the first place, and the information and advice that he had gave me during the course of his employment by myself, that he afforded the opportunities to the Macris * * *"

Then on page 63 the Court said, referring to the Yakima cases and all of it:

"It was a very complex series of cases, not only this one but others involving the Continental Casu-

alty Company, and most of them were settled in pre-trial conference.”

Mr. Schaefer said:

“That was with other parties.”

And the Court said:

“Yes, but it necessarily took quite a long time to try out. It’s your position that these proceedings in the Eastern District of Washington continued to constitute overt acts, that is, the proceedings that a defendant and a plaintiff would normally go through in an ordinary lawsuit, that every time the defendants did something over there it was an overt act?”

“Mr. Schaefer: Yes, it is.”

And then the Court said:

“This I must say is a unique and a very unusual experience for me. It’s difficult for me to understand, but I’m trying [42] to get your point of view. Here’s a case that was a very close and difficult one, I think. I happen to know Mr. Olson was very much concerned about it and didn’t think his chances were too good of winning in the Court of Appeals; I thought the chances were not much more than even. I wouldn’t have bet one way or another * * *”

This is the Judge who tried the case.

“* * * what the Court of Appeals would have done. You were well represented. Mr. Olson presented the case very well. Mr. Holman, of course, was an excellent lawyer and made a good presentation on the other side. I couldn’t see any indication of the slightest conspiracy. I thought it was a

hard-fought, close lawsuit in which I might just as well have found against you as for you, it was that close. You got almost a perfect result, and here I find you suing the losers and the attorney for a million dollars. It's a queer situation. I think perhaps you've come to the realization which many litigants don't, that litigation necessarily and unfortunately is expensive, and that it isn't as profitable even for the winner as is sometimes thought. Now, I don't know; you think here that Mr. McKelvy and the bonding company and Mr. Macri conspired to hold up this performance and ruin you and bankrupt you?

"That's right," he said.

And then going over to page 68, the Court said:

"I'm trying to get at your point of view, Mr. Schaefer. It seems to me your complaint indicates that you allege certain things, that Macri was slow in getting started, and that he held back his [43] performance, and then McKelvy failed to disclose to you that his firm represented or at least they had some arrangement to represent the Continental Casualty Company, and held you up in getting your suit started, and that this suit was brought over here by you against Macri and the Continental, and that certain proceedings went on in that up to the time they paid you the judgment, but what is there to connect these things together and bind them together into an agreement between these defendants? Where and when and what did they do against you that is the basis of this million dollars in damages?"

Again on page 69:

“The difficulty is here, of course, that most of these things you’ve alleged as overt acts do not, because of their nature, carry any inference that they were the product of a conspiracy or that they were intended to do you injury. If there are certain types of unlawful action you can show have been taken, of course we might assume, since there is a concert of action and these things were done in the way they were, we can relate them back and say, ‘These people must have intended the consequences of their unlawful and improper acts,’ and we can assume they must have conspired; but here you’ve got a perfectly natural and normal sequence of events, that a subcontractor got into a disagreement and a jam with his general contractor, here’s a bonding company that stands off in an ordinary way, you went into court and it was determined and the defendants appealed, as they had a perfect right to do, and tried to get certiorari, and finally paid you the judgment. You won the lawsuit and they lost. Aside from that is [44] this difference with Mr. McKelvy that came after you claim the Macris tried to damage you. The fact a busy lawyer in a large firm may have overlooked the fact that he had some conflict of interest there, that is the only thing you’ve got, as I see it, that wouldn’t be in the ordinary course of this kind of a transaction.”

And, on the bottom of page 70:

“Well, if the Continental Casualty Company had made a deal with McKelvy to block you out of

court, don't you think they'd have blocked you another month, until your statute of limitations had run, the one year statute under the Miller Act? McKelvy must be a very bungling conspirator if he doesn't hold you up another month and keep you from going into court, when he tells you you've got a month left and you go get another attorney and start your suit. A prime contractor doesn't delay performance at the beginning of the contract in order to ruin a subcontractor, and of all things, a bonding company wouldn't conspire with the main contractor and say, 'You hold back and we'll fix this fellow Schaefer, we'll break him.' Do you think the Continental Casualty Company would do that? That's what you're claiming, although I don't think you allege it in your complaint."

And then again on line 14:

"It happened that your unfortunate experience with McKelvy, the delay in Mr. Macri's performance, the things that the Continental Casualty Company did in contesting this lawsuit, all of them turned out to injure you very greatly, but that doesn't make a conspiracy unless there was an arrangement and an agreement between [45] them beforehand to do that sort of thing."

Going over this page 74, beginning where they talk about—he is referring to Willard Skeel in the Yakima law suit in which he was involved, and then my comment on page 75 I will reiterate:

"Your Honor, that was the transcript of the evidence in the use cases, which on stipulation was in-

corporated in your case, or in Schaefer's case."

They took part of that record out and incorporated it into the Schaefer case.

The Court said:

"Yes, I notice that Mr. Hawkins seems to be the attorney in this matter. There were several of those cases, and the Continental Casualty Company was interested in the use cases as well as your case. All right, go ahead."

And then Schaefer talks and the Court, on page 78, said:

"I think you're mistaken about that, Mr. Schaefer. I think Mr. Skeel appeared in one of the other numbered cases in which the Continental Casualty Company was interested, of course, as bonding company for Mr. Macri, but in which you were not the plaintiff. I'll check that up as best I can."

Now I think that is all except to reiterate this statment. I would like to quote again from 11 Am. Jur. § 45:

"Accurately speaking, there is no such thing as a civil action for conspiracy. The action is for damages caused by acts [46] committed pursuant to a formed conspiracy, rather than by the conspiracy itself; and unless something is actually done by one or more of the conspirators which results in damage, no civil action lies against anyone. The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof—the damage—not the conspiracy or the combination. To sustain a civil

action for conspiracy, special damages must be proved.”

There must be a meeting of the minds. There are no combinations in this, because no act is alleged in which you can infer a combination.

Mr. Schaefer’s experience with McKelvy was, one, in our office; and then going over to Yakima and bringing the suits, carried on to appeal and then judgment paid, and then, two, one morning in his office in Portland Mr. McKelvy asked him to pay his bill and he said that that was done in order to prevent him bringing the law suit. Anyway, he refused to pay his bill.

Now, it is not unlawful and does not infer an unlawful act in bringing a law suit. *Abbott v. Thorne*, 34 Wash. 691. I have cited cases on that in the little memorandum. In that case there was an allegation of conspiracy to prosecute unlawfully a civil action and the court said:

“While it is no doubt true that, in some instances . . .”

The court referred to remedy or relief against wrongful law suits. Now this remark:

“While it is no doubt true that, in some instances, the [47] peril of costs is not a sufficient restraint, and the recovery of costs is not an adequate compensation for the expenses and annoyances incident to the defense of a suit, yet all who indulge in litigation are necessarily subject to burden the exact weight of which cannot be calculated in advance, and a rule must be established which, as a whole, is the most wholesome in its effects, and accords in

the greatest degree with public policy. If the rule were established that an action could be maintained simply upon the failure of a plaintiff to substantiate the allegations of his complaint in the original action, litigation would become interminable, and the failure of one suit, instead of ending litigation, which is the policy of the law, would be a precursor of another; and, if that suit perchance should fail, it would establish the basis for still another."

And, quoting an Iowa court:

"If an action may be maintained against a plaintiff for the malicious prosecution of a suit without probable cause, why should not a right of action accrue against a defendant who defends without probable cause and with malice? The doctrine surely tends to discourage vexatious litigation, rather than to promote it."

"It seems to us that there is much common sense in this observation, for the affirmative allegations of an answer are as liable to contain malicious statements as the affirmative allegations of a complaint; and the result would be, if the doctrine contended for were upheld to its logical conclusion, that the plaintiff in an action would be entitled to damages for the unsupported allegations of an answer; for [48] there is as much publicity given to an answer in an action as there is to a complaint . . ."

And the court held that there would be no remedy either against the individual or as conspiracy for the malicious prosecution of a law suit without arrest of the person or attachment, and that was the holding in those two law suits.

These people had a right to defend their law suit in Yakima and there is nothing to connect McKelvy. The case where McKelvy represented the Macris was simply a subrogation case and it was routine and handled by Mr. Rohan in our office.

The Court: Mr. Egan, do you wish to be heard?

Mr. Egan: Yes.

The Court: How much time do you desire?

Mr. Egan: Just very shortly, your Honor.

The Court: Court will take a five minute recess.

(Whereupon, at 4:00 o'clock p.m. a recess was had until 4:05 o'clock p.m., August 6, 1951, at which time, counsel heretofore noted being present, the following proceedings were had, to wit:)

The Court: Mr. Egan?

Mr. Egan: May it please the Court, as the Court is probably aware, I represent the Defendants Macri.

Let me go back just a little. We had a prime contract with the United States. We entered into a subcontract——

The Court: The Court is familiar with the [49] facts.

Mr. Egan: Very well, your Honor.

If there is any allegation of acts of a party defendant, the first one would be paragraph VI on page 3. Plaintiff says:

“That defendants and each of them willfully, maliciously and with deliberate intent to injure,

damage and defraud the plaintiff in his performance of said subcontract and otherwise did unlawfully and in accordance with a preconceived plan confederate together, combine, conspire and agree to cause plaintiff to become financially bankrupt, to cause plaintiff to lose his said business and its assets, to ruin plaintiff's business and personal reputation and credit. In furtherance of said willful, intentional conspiracy as aforesaid, defendants engaged in a series of tortious acts continuing from the inception of work by the plaintiff under said subcontract dated March 15, 1944, to and including August 18, 1950, said acts consisting in principal part, of the following:"

That, of course, is an excellent shotgun blast to cover everything within range but I do call the Court's attention to the fact that the Plaintiff uses the words "preconceived plan."

Then the Plaintiff says:

"The defendants Macri in furtherance of said conspiracy willfully and intentionally failed and refused to do that portion of the work which under the terms of the agreement between the said Macris and the plaintiff were to be done by said Macris prior to the work to be done by plaintiff, namely: Willfully failing and refusing to make the excavations in a proper manner, willfully failing and refusing [51] to do the grading in a proper manner and willfully failing and refusing to furnish the kind, quantity and quality of lumber required to be furnished by them as a condition precedent to the performance of plaintiff's portion of the work,

all designed and intended to and in fact causing plaintiff considerable unnecessary delay and greatly increased cost, and further, willfully and intentionally failing and refusing to make the payments required under said sub-contract; all of which acts and omissions were continuous from the inception of work by the plaintiff to the end of the job * * *”

Then if I may call the Court’s attention to Exhibit M, and I am looking at page 4 thereof, starting at page 25.

The Court: Line 25.

Mr. Egan: Yes, line—line 25.

“In short, the court finds that Mr. Macri breached the subcontract, or those portions of them to be performed by him in the particulars which I have designated; that his breach was willful and negligent, and that was true both as to the character of excavations and fine grading and time it was done, the amount and quality of lumber and the time it was furnished, and that this breach of Mr. Macri’s part was a continuing breach, which continued and existed and persisted throughout the entire performance of this contract until the very end of its performance by Mr. Schaefer.”

The next point at which we are mentioned, your Honor, is in the Second Amended Complaint, page 4, paragraph B, alleging that: [51]

“On or about the 15th day of July, 1944, in furtherance of said conspiracy, defendants Philp and Goerig and said Macris entered into an alleged Agreement (copy attached as Exhibit B, and by this reference thereto made a part hereof, as though set

out herein in full), terminating said joint venture agreement of December 11, 1943. Said alleged termination agreement was fictitious and was executed solely to confuse the facts and deprive plaintiff of a cause of suit or action against Philp and Goerig.”

Then the next one is at page 9, in which it is alleged in paragraph F:

“In furtherance of the conspiracy, said defendants and each of them caused a suit to be filed in the Circuit Court of the State of Oregon for the County of Multnomah on the 14th of December, 1945, copy of the complaint and summons herein are attached as Exhibit J, and by this reference made a part hereof as though set out herein in full, wherein the defendants Macri alleged that they had suffered damages in the amount of \$40,000.00 by virtue of plaintiff’s alleged breach of said second subcontract dated April 21, 1944, which said suit was malicious, willful abuse of legal process, was without any proper cause whatsoever, and was filed for the sole purpose of and in fact had the effect of drying up plaintiff’s credit, causing him severe damage to his business in Portland and reducing him to such an impecunious financial condition as to make it virtually impossible to continue the prosecution of the threatened suit in Yakima, Washington, and the filing of the suit in Oregon was possible only [52] because of the omission of defendant McKelvy to terminate said second contract as heretofore alleged.”

So that, your Honor, in December 14, 1945, he alleges, that the Macris filed an action in the Circuit

Court, State of Oregon, that caused him severe damage and reduced him to such an impecunious financial condition that it made it impossible to continue the suit in Yakima, Washington.

On page 10, your Honor, he said that—starting at page 10—he talks about the Miller Act:

“* * * copy of which is hereto attached as Exhibit K, and by this reference made a part hereof as though set out herein in full; which suit was filed on or about the 20th day of December, 1945 * * *”

So the suit in Portland which made it practically impossible for him to continue his suit in Yakima was filed six days thereafter.

Now, the remaining act of defendants Macri, your Honor, under the conspiracy as alleged, consisted of defending the law suit and taking the proper steps on appeal which their attorney thought necessary to protect their interest.

On the first item, which is in paragraph VI, your Honor, and which has relation to the Defendants wilfully failing and refusing to make the excavations in a proper manner and wilfully refusing to do the grading and to furnish the kind and quality of lumber required, obviously, whatever rights he had he put before the court in Yakima because the court found what happened and gave him [53] damages.

The Plaintiff sued because the Defendants Macri had done these things. If this could be done there was no use in entering judgment because one is never safe in obtaining a judgment because this judgment is paid for.

Now in the second item which we are alleged to have performed, we dissolved a partnership agreement. His conclusion is one of law.

The third item, the suit in Portland, was merged with the final suit in Yakima in which he received judgment.

And then, of course, come the items which the Defendants Macri performed in defending the action. Certainly they had a right to defend the action. They did nothing wrongful. Plaintiff says he was injured by their delaying the action, or by going to the Circuit Court of Appeals.

There is nothing wrongful that is alleged in the entire Complaint that has not already been covered by the prior actions.

So the entire matter becomes *res adjudicata*.

Now he has not shown any arrangement or agreement beforehand. He says there was a preconceived plan and yet, he says, the Defendants Macri immediately started to willfully breach the contract so that then, in November he went—that was in March—in November then he went to McKelvy and told McKelvy all the breaches that have been committed by the Defendant Macris.

At that time, obviously, there couldn't have been any cooperation, or any conspiracy, over that matter between McKelvy and [54] the Defendants Macri.

He says there was a preconceived plan and then he says he went to McKelvy after the damages under the contract and told McKelvy what the Macris did to him.

So, obviously, there was no agreement beforehand.

On the other hand, he shows no place that there was any agreement beforehand.

I don't intend to take as much time as the others did because I feel that my predecessors took care of the matter pretty well.

I would like to call your attention to Judge Driver's opinion, one little matter which Mrs. Curry did not cover. I am referring to page 65. I am reading the last words:

"Well, I'll read it, but I don't see how you can contend that when you bring suit against a bonding company and a prime contractor that they haven't got the right to defend that action. I would have thought, frankly, that these attorneys who defended the case, Mr. Holman and Mr. Ivy, I would have thought they weren't doing their full duty if they hadn't defended as they did and if they hadn't taken an appeal, because I thought as a former lawyer and a judge that it was close enough there should be an appeal. I couldn't see any indication that anybody was trying to conspire against you. I didn't think your skirts were any too clean either, although I thought the balance was in favor of you against Mr. Macri."

Our crime is this: We have drifted into insolvency as a result of this, we feel it very keenly. We feel that this has gone [55] beyond prosecution and into the realm of persecution.

If your Honor permits this action—my clients are not Continental Casualty Company and not Mr.

McKelvy—they are people who have been driven out of business—I think we should be secured. Our costs will be tremendous and I think if your Honor is going to permit this action to be brought that my client should be protected in that way.

Mrs. Curry: May I make a statement before Counsel speaks so that he will know our position? I want him to know that we will request your Honor for dismissal without leave to amend this the third time. We will ask, your Honor, for dismissal without leave to amend.

Mr. Schaefer: I will go along with that. If he dismisses I would want it with prejudice so that I would be prepared to appeal.

The Court: I might say, Mr. Schaefer, in carrying on your argument, that this Court has gone over this problem fully and the portions gone over by Judge Lemmon and Judge Driver and I would suggest that you address your remarks to the question as indicated by the Court earlier.

In other words, in what respects have you now cured your Complaint of the deficiencies pointed out by Judge Driver?

Mr. Schaefer: Now on that——

The Court: As you are probably aware, having been against it several times before Judge Driver and Judge Lemmon, an [56] argument of this character is not for the purpose of taking up the issues.

Mr. Schaefer: Now do I understand that I have one hour and fifteen minutes?

The Court: Will that be sufficient?

Mr. Schaefer: I thought you had divided the half hour that had been taken between the two of us.

The Court: Yes.

Mr. Schaefer: Now on this: I am not an attorney and I have the material lined out in such a way as to read the great bulk of the material into the record and for that reason I want to ask whether I am permitted at this time then to go into the motion. That is, to read the motion for order permitting filing of supplemental complaint and also the reading of the memorandum made at the time of this man Rask coming to my office.

That was the line up I was going to follow, and then I was going to go into my statements.

The Court: Well the motion, Mr. Schaefer, has been filed. Are you speaking just about reading the motion itself?

Mr. Schaefer: Yes.

The Court: The motion will be filed and will appear in the record, and I believe counsel have read it.

Mr. Schaefer: Then we will by-pass that.

The Court: It will serve no purpose to read it into the record again. [57]

Mr. Schaefer: Then I will read the memorandum made at the time of this man Rask's appearance into my office.

The Court: In regard to that, Mr. Schaefer, this motion was filed and counsel stipulated that the allegations appearing in that motion insofar as they were applicable and properly pleaded would

be considered as amendatory to the Complaint for the purpose of this motion.

Therefore, it has served the purpose of amending this Complaint but the Court does not permit the joining of another Defendant, namely, B. J. Rask, at this time.

But the allegations insofar as they might relate to the Complaint have been permitted as amendatory for the purpose of this motion.

That would not mean you could recite a conversation. You are alleging here, purportedly alleging, that Mr. Rask came into your office and spoke to you about the insurance and bonding business and divulged that he was working on matters in this law suit and "threatened life and welfare of Plaintiff and intimidated plaintiff and his family if plaintiff persisted in this law suit, and plaintiff alleges that said Rask was and now is a member of said conspiracy."

That purportedly is an allegation relating to this conspiracy. Frankly the Court feels that it may be a conclusion and not properly pleaded and it would not permit you to discuss it.

Mr. Schaefer: Or to hand in a copy of the memorandum? [58]

The Court: The most the Court can do at this time is to permit the stipulation which would be amendatory. That is as far as the Court can go at this time and this matter now is being heard on the motion to dismiss the second amended complaint.

Therefore, it would not serve any purpose to read

into the record the conversation between you and Mr. Rask following, or it transpired, I assume, the date of this.

Mr. Schaefer: On that date, and then there is another that came in on the 5th of April.

Well, then, I will go into my statement.

Your Honor stated at the hearing on July 9, 1951, that my remarks should be directed primarily to the points raised in the last ruling of the Court and that I show wherein this second amended complaint meets the defects of the former complaints.

As I understand these motions, all are identical except McKelvy's which has the same two points as the others but adds two more, namely, misjoinder of causes and of parties, but I take these last two points as being only a different way of saying failure to state a cause of action.

Hence, my remarks are directed to all of the motions.

Judge Driver stated in his ruling on May 2, 1951, as follows:

"In the opening sentence of paragraph III of the amended complaint there appears the statement that the defendants 'did wrongfully and maliciously conspire, combine and confederate together with [59] wilful malicious intent to injure, damage and defraud plaintiff.' On page 5 of the complaint there appears the statement that defendants Macri, Philp and Goerig, and Continental Casualty Company through its agent and attorney in fact, defendant Philp, 'were attempting from the beginning of said subcontract to bankrupt plaintiff, ruin his reputa-

tion and credit, by not paying plaintiff as per contract requirements, by not performing their part of the work, or else performing it badly, thereby increasing cost to plaintiff and hampering and delaying plaintiff and exhausting plaintiff's operating capital.'

"If it is the plaintiff's position that these things which he states on page 5 the defendants were attempting to do were the things that they agreed and as a preconceived plan conspired to do, he should definitely so state, and should then set out in the plaint, concise and direct way the rules of civil procedure prescribe, the principal overt acts done in furtherance of the conspiracy including the latest ones which occurred within the statutory period of limitation."

This Second Amended Complaint meets this objection by:

1. In paragraphs II, III, IV and V, I have attempted clearly to show the various close and interlocking relationships between all the various defendants and to show how they all had certain interests in common.

2. In paragraph VI, I allege:

"That defendants and each of them wilfully, maliciously and with deliberate intent to injure, damage and defraud the plaintiff in [60] his performance of said sub-contract and otherwise did unlawfully and in accordance with a preconceived plan confederate together, combine, conspire and agree to cause plaintiff to become financially bankrupt, to cause plaintiff to lose his said business and

its assets, to ruin plaintiff's business and personal reputation and credit. In furtherance of said wilful, intentional conspiracy as aforesaid, defendants engaged in a series of tortious acts continuing from the inception of work by the plaintiff under said sub-contract dated March 15, 1944, to and including August 18, 1950, said acts consisting in principal part, of the following:"

3. In the sub-paragraphs of Paragraph VI, I set forth the principal acts done in furtherance of said conspiracy:

a. Covers the acts of the Macris in wilful non-performance of their part of the work;

b. Covers the fictitious agreement of the Macris with Philp and Goerig purportedly terminating their joint venture agreement;

c. Deals with the retention of McKelvy and all the statements made and information given to him;

d. Deals with the fact that McKelvy, while purportedly representing me, in fact represented Continental Casualty Company and Macris as attorney of record for them in other cases and did everything in his power to my detriment and for their benefit;

e., f., g. and h. Shows in detail the misuse of the judicial process as part of and in furtherance of the conspiracy;

i. Shows the attempt to preclude this suit when the [61] judgment in the former suit was paid;

j. Shows the attempt by McKelvy in August, 1950, along the same lines.

In paragraph VII, I have alleged the damages flowing from this conspiracy.

The objection that the former complaint was verbose has been met as nearly as humanly possible considering the complexities of the facts of this case.

I believe all the objections formerly raised are fully met and that a legally sufficient complaint has been filed that will stand up under an attack such as here to dismiss for failure to state a cause of action.

My authorities are set forth in a memorandum, original of which I hand you and copy for each of the attorneys.

(Whereupon copy of memorandum handed to court and counsel.)

“Memorandum of M. C. Schaefer resisting motion of defendants to dismiss Plaintiff’s Second Amended Complaint.

“Conspiracies need not be established by direct evidence of the acts charged. They may, and generally must, be proved by a number of indefinite acts, conditions, and circumstances which vary according to the purposes to be accomplished. The very existence of a conspiracy is generally a matter of inference deduced from certain acts of the persons accused which are committed in pursuance of an apparently criminal or unlawful purpose in common to them. The [62] existence of the agreement or joint assent of the minds need not be proved directly, but may be inferred by the jury

from other facts proved. It is not necessary to prove that the defendants came together and actually agreed upon the unlawful purpose and its pursuit by common means. If it is proved that the defendants, with a view to the attainment of the same purpose, pursued such purpose by their acts—often by the same means, each performing some part thereof—the jury will be justified in concluding that they were engaged in a conspiracy to effect a common object. If, therefore, one concurs in a conspiracy, no proof of agreement to concur is necessary in order to make him guilty. His participation in the conspiracy may be established without showing his name or giving his description.

“11 American Jurisprudence, Conspiracy, Section 38.

“When a conspiracy is established, everything said, written, or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done, or written by every one of them, and may be proved against each.

“11 American Jurisprudence, Conspiracy, Section 40.

“The prosecutor may either prove the conspiracy, which renders the acts and declarations of the conspirators admissible in evidence, or he may prove the acts of the different persons and thus prove the conspiracy. However, there must be some tangible, material evidence of the conspiracy or a promise of its production before the Court can properly admit evidence of statements made in the absence and without the knowledge of the party against

whom they are offered. [63] The evidence need not be direct, positive, and conclusive; but there should be some evidence, and it is for the Court, in the first instance, to say whether or not it exists.

“11 American Jurisprudence, Conspiracy, Section 42.

“The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof—the damage—not the conspiracy or the combination.

“11 American Jurisprudence, Conspiracy, Section 45.

“The connection between the parties having been established, whatever was done in pursuance of the conspiracy by one of the conspirators is considered as the act of all the conspirators; all are equally liable therefor as joint tort-feasors, regardless of whether they were original parties to the conspiracy and irrespective of either the fact that they did not actively participate therein or the extent to which they benefited thereby. However, where the unlawfulness of a conspiracy arises from acts subsequent to its formation and to those originally contemplated, only those persons participating in the unlawful acts are liable therefor. It is not necessary, in order to establish that the defendants are co-conspirators, to prove that the conspiracy originated with them, or that they met during the process of the concoction of the scheme.

“11 American Jurisprudence, Conspiracy, Section 48.

“Attention is also drawn to citations appearing in Volume 3, Permanent A. L. R. Digest, Con-

spiracy, Section 1. Attention is specifically drawn to the case of *A. T. Stearns Lumber Co. [64] vs. Howlett*, 52 A. L. R. 1125, holding that the unlawfulness of a conspiracy may be found either in the end sought or the means used.

“The complaint does allege a concert of the parties to accomplish either an unlawful purpose or a lawful purpose unlawfully.

“In 168 Pacific 2d 797, *Lyle vs. Hoskins*, the Washington Supreme Court laid down the rule that allegation of a conspiracy and proof thereof by circumstantial evidence is all that can be required due to the very nature of the offense and that direct and positive allegation and proof is not required.

“Here plaintiff alleges in Paragraph VI, that between 3/2/44 and 8/18/50 defendants did wrongfully and maliciously conspire, combine and confederate together with wilful and malicious intent to injure and damage plaintiff, and that as the direct and proximate result of the overt acts committed pursuant thereto (which said acts are alleged in detail in the pages following) plaintiff suffered the damages more fully alleged in Paragraph VII.

“In the light of all authorities cited by defendant and of *Lyle vs. Hoskins*, 168 Pacific 2d 797, *supra*, it is abundantly clear that the web of intrigue, conflicting interests, and interrelated activity of the several parties defendant, that the wealth of detail alleged in support of the general allegation of a conspiracy to damage plaintiff amply support plaintiff's allegation, prevents its being a mere conclu-

sion and is necessary in order to state a cause of action.

“The Statute of Limitations does not bar this action.

“The running of the Statute of Limitations in a civil [65] action for conspiracy has not been the subject of judicial determination in many instances. However, in *State vs. Arkansas Lumber Company*, 260 Missouri 212, 169 S.W. 145, the Court held that the Statute commences to run as of the date of the last overt act under the conspiracy. Also in *Montgomery vs. Crum*, 199 Indiana 660, 161 N. E. 251, the Court also held that in an action for damages resulting from one continuous wrong extending over a period of years the Statute of Limitations does not begin to run until there is a cessation of the overt acts constituting the wrong. To the same effect also is the holding in *Clark vs. Mochetti*, 92 Colorado 365, 21 Pacific 2d 182; 41 Hun 645, 3 N.Y.S.R. 309.

“In *Northern Kentucky Telephone Company vs. Southern Bell Telephone Company*, 73 Federal 2d 333, 97 A. L. R. 133, is an exhaustive opinion citing the Rule in Civil conspiracies, and holds that the statute begins to run as of the last of a contemplated series of acts and further holds that the act of one conspirator is attributable to all after the formation of the conspiracy and during its existence.

“See also the annotation in 97 A. L. R. 137.

“It must also be noted that in this action the

Federal Court will ordinarily apply state rules as it is a case where jurisdiction is based on diversity and on amount. No decision can be found wherein the Supreme Court of the State of Washington has ruled on the point involved here and none is cited by defendant.

“The case relied on by defendant, i.e., *Mitchell vs. Greenough*, is one in which the overt act clearly occurred beyond the [66] limitation period; here, however, there are acts alleged within the limitation period and within a few months of the filing of plaintiff’s original complaint.

“As held in the case of *Moffett vs. Commerce Trust Company*, 75 Federal Supplement 303, where jurisdiction is based upon diversity, a Federal Court will apply state rules with respect to statutes of limitation. No decision can be found in which the Supreme Court of the State of Washington has ruled as to what the applicable statutory period of limitation is for a civil conspiracy, nor how to compute the time, that is, from the last overt act or from some other time. Accordingly, the matter is apparently one of first instance in this court, and the court is at liberty to settle upon whatever rule impresses the court as being the best-reasoned and most equitable.”

Now, it is clearly shown in the record here that W. R. McKelvy represented the Continental Casualty Company and the three Macris at the very time that he undertook to represent me in a lawsuit against these very same parties. We have found no case of record wherein Tom Holman was

at that time representing the Macris, though McKelvy told me on the day that I first met him, on or about November 1, 1944, and he agreed to represent me, that Holman was Macris' attorney, yet McKelvy continued to represent the Macris for better than five months or to and including April 4, 1945.

I think the statement made to me by Mr. McKelvy that though Holman was then associated with another office, that Holman and he (McKelvy) were cooperating as though they were still associated in the [67] same office, is fully borne out by the fact that, bingo, Mr. McKelvy handed Mr. Holman a client on November 1, 1944, and further explains the questions asked by Mr. Holman of Allyn R. Hunter (one of plaintiff's witnesses who handled plaintiff's bonding business as agent for the Glens Falls Indemnity Company) at the trial in Yakima (see transcript, page 966) in answer to a question by the Court:

“Mr. Holman: No, not at all, your Honor, but there is a contention as to whether or not the proceeds of the sub-contract have been assigned to the Glens Falls Indemnity Company.

“Mr. Olson: Is it your contention that the Glens Falls Indemnity Company have advanced some money on this case?

“Mr. Holman: I strongly suspect it, yes, but I can't prove it.

“Mr. Olson: Your suspicions are entirely unjustified.”

Now the only source for Mr. Holman's suspicions

was from the fact that I had made a full disclosure of my financial condition to Mr. McKelvy and together with the facts that Macri had his assets hid, that the letter of February 13, 1945, was claimed not to have been sent, and the fact that the representative of Continental Casualty Company at the time of the acceptance of the draft at Yakima had to phone Mr. McKelvy, go to prove beyond any doubt that Mr. Holman was acting for and as though he was still in the McKelvy office.

Now they make the statement that I received my judgment and that that covered it.

That covered only for the physical product, the physical [68] cost, rather the cost of doing the physical work on the construction job.

We were required to file under the Miller Act. The fact is that we have spent better than 46 thousand dollars out of pocket money to collect just—that is just the cost of collecting the 57 thousand dollars plus interest that we had coming on doing the job.

Now, Mr. McKelvy undertook to represent me and at that time he knew—and there is no excuse—and no one can excuse that—that, even though as Judge Driver said he was a busy attorney in a busy office and that he overlooked that fact—that doesn't seem to satisfy me at all, because here he was representing both the Continental Casualty Company and Mr. Macri at the very time that he undertook to represent me.

Judge Bowen—we were before Judge Bowen

January 9, 1951—taken from the transcript of record, page 22, starting line 12—said:

“My thought is that in view of the facts that it promises to be lengthy in respect to the further arguments, and I do not know how long my cold is going to last, I am inclined to feel for that reason I should ask Judge Lemmon to hear the case, and he will arrange a time in the future when he would be able to hear it.

“Mrs. Curry: Your Honor means by ‘the case,’ the motion?

“The Court: I mean the whole case. Judge Lemmon is like any other judge; he will hear counsel in respect to their convenience about future hearings, if any, to be had.” [69]

That shows that Judge Bowen had an idea that there was more to this thing than just the motion to dismiss.

Then on page 26, starting on line 10:

“I will say to you that I am sorry that you had to spend all of this time before I realized that I felt these arrangements should be made. I did not know this case was on the calendar until this morning, and, of course, I did not realize the time that was involved in the matter.

“I do wish to assure you that the principal reason I have for asking you to consent to this assignment is because I think it could on these motions involve not only today’s work but very considerable additional time, and I have already enough work under advisement on my desk. I do not know how long this cold I have is going to last, and I thought,

out of consideration for you, I should do what has been done, and I understand that all of you consent to it.”

I hoped that Judge Bowen was going to hear it. I believe I answered five questions put to me that I wanted him to hear it.

Now, when it came before his Honor, Judge Lemmon, I was asked by the Clerk about how long I expected it would take me on argument. I said I thought it would take six to eight hours. I was informed that both sides would be heard in two hours and that it would be over with by noon.

So I asked Judge Lemmon, on pages 42 and 43, on line 24, page 42:

“I would like to ask the privilege of a thirty-day time [70] limit for the purpose of filing an amended Complaint because I believe I can file the Complaint in accordance with the facts which is not barred by the Statute of Limitations.”

On page 58, starting line 10:

“I will be obliged to grant these motions and I do it with the provision that you may have a reasonable time within which to file an amended pleading. How much would you want? Would you want as much as thirty days?”

It wasn't on the proposition of a complete dismissal or a complete granting of the motion to dismiss. I had asked for thirty days because I had then an idea of what was going to be required and that I would have to put more material in print.

Then when it comes to Judge Driver's decision the attorneys for defendant sent in their order not

in accordance with what his decision had been but included "for the reason that the Complaint of the Plaintiff fails to state a cause of action against this Defendant upon which relief can be granted."

And, "for the further reason that the said complaint is verbose, redundant * * *" and so on.

Judge Driver said he would give his decision in a few days. It was sixteen days later that I heard his decision. Immediately upon receiving it I sent a wire to Judge Driver. It reads: "Re Schaefer v. Macri. Object to any grounds for dismissal except redundancy. Letter follows."

In the latter dated May 8th: [71]

"This will acknowledge receipt of copy of order submitted on behalf of Defendant McKelvy. I object to the language beginning with the word 'does' at line 16, to and including the word 'complaint' near the center of line 21. As I read your memorandum opinion, your sole basis was the fact that the complaint is verbose and redundant."

On behalf of the Macris', "I object to the same language beginning page 22, line 21, with the word 'fail' to and including the word 'complaint,' page 24. This same objection is made to all defendants should the others incorporate such language in their order."

Judge Driver then wrote his own form of order and in it he says:

"The court heard the arguments for and against said motions and hereby finds that the motions to dismiss, and each of them, should be granted upon the grounds and for the reasons that plaintiff's

complaint does not set forth a short and plain statement of the claim showing that the plaintiff is entitled to relief, and its averments are not simple, concise and direct, but, on the contrary, are verbose, redundant, unnecessarily detailed, and contain much evidentiary, hearsay, and immaterial matter, contrary to the requirements of Rule 8 (a) and (e) of the Rules of Civil Procedure and the complaint does not conform to Rule 10 (b) of such rules which requires that all averments of a claim shall be made in numbered paragraphs, the contents of each of which shall be limited, as far as practicable, to the statement of a single set of circumstances. [72]

“* * * but the plaintiff is hereby granted thirty days from the date of the filing of this order within which to file a second amended complaint.”

Now I was rather surprised. There has been throughout this case so far many statements made that did not conform to my complaint, that weren't quoting the complaint. But, when Judge Driver makes a statement here, on page 16, line 1:

“The Court: Before that it was Skeel and Whitney; I worked there for six months in 1916. Scarcely any member of the bar in the State of Washington hasn't at one time or another. I worked in Skeel and Whitney's office from June to December, 1916, the year I graduated from law school.”

Page 65, line 2:

“* * * I thought it was a hard-fought, close lawsuit in which I might just as well have found against you as for you, it was that close. You got

almost a perfect result, and here I find you suing the losers and the attorney for a million dollars. It's a queer situation. I think perhaps you've come to the realization which many litigants don't, that litigation necessarily and unfortunately is expensive, and that it isn't as profitable even for the winner as is sometimes thought."

Then, line 14, he said, the Court said:

"You really think that, huh?" to which I said——

The Court: Mr. Schaefer, are you directing criticism at the Court?

Mr. Schaefer: I have another paper here that I wish [73] to read. I have just quoted what was said here, your Honor.

The Court: The Court has read that. Is it your purpose to attempt to show prejudice of some kind?

Mr. Schaefer: Yes, your Honor.

The Court: I suggest that, if it would serve any purpose in that respect, Mr. Schaefer, that you confine yourself to the merits.

Mr. Schaefer: Well, I want to clear up a few of these points because of what I have to say after this.

The Court: You may proceed.

Mr. Schaefer: On page 66. Other counsel has read it. On line 2:

"I didn't think your skirts were any too clean either * * *"

In that case over there I had all my witnesses in the hotel room and I told them all, I instructed all of them, to go in there and to not tell a lie. Not

that much of one. (Indicating with fingers.) Leave it to the other side to do any of that. All we need is the facts. Just go in and tell the truth of the matters but neither should they be caught off guard and only give a partial answer, to see that a complete answer was given. And here the judge charges me with having dirty skirts, so to speak. I do not see it.

Then, on page 70, line 2:

“The fact a busy lawyer in a large firm may have overlooked the fact that he had some conflict of interest there, that is the only thing you’ve got, as I see it, that wouldn’t be in the ordinary [74] course of this kind of a transaction.”

Mr. Egan said, on April 16th, before his Honor, Judge Driver, starting line 11, on page 52:

“My clients feel it strange that a litigant should break them in one instance and then continue after them after he has enacted his pound of flesh. Perhaps we feel a little more bitter about this, your Honor, than the others do, and perhaps we do not have as much patience as we should have with a man bringing his own action in this. The record, and I’m not going outside the record, your Honor, will show that the Continental Casualty Company paid the judgment in this instance, took judgment over against my clients, and that that judgment remains unsatisfied, * * *”

I think that the Macris are very much in the contracting business. Just recently Mr. Macri together with another company bid on a job in excess

of one million dollars in Alaska and that has been within the last couple of weeks.

I believe also that State Construction Company is a Macri company. I believe that Stateside Construction Company is a Macri Company and they are no small companies.

Now, I would like to read fully these fourteen pages of my Complaint. I feel the reason here is that there have been partial quotations from it which may leave a different opinion even though your Honor, I assume, has read the whole of the complaint.

The Court: Yes.

Mr. Schaefer: May I go ahead and read the whole [75] complaint, that is, these first fourteen pages because there will be certain comments I want to make as I go through the complaint.

The Court: I might ask counsel, do you prefer to continue this evening or to take up in the morning at nine o'clock. The Court has a trial starting at ten.

Mr. Curry: It doesn't make any difference to me. I have been rather opposed to having late sessions but I am so crowded for work at the office that I will be glad to dispose of it.

The Court: The Court is not inclined to having overtime sessions but today having been a very full day the Court is inclined to fall in with the desire of counsel whether they prefer to adjourn until nine o'clock or continue.

Mr. Schaefer: I would prefer to go on.

The Court: All right. I think we will. You

have now approximately one-half hour. Is that about correct? I didn't note the time.

The Court will take a five-minute recess and then you will have until twenty minutes to six.

Mr. Schaefer: All right.

(Whereupon, at 5:10 o'clock p.m. a recess was had until 5:15 o'clock p.m. August 6, 1951, at which time, counsel heretofore noted being present, the following proceedings were had, to wit:)

The Court: You may continue.

Mr. Schaefer: Now, your Honor, instead of starting [76] with the reading of this Complaint, I believe that it would serve my purpose a whole lot better to read just two pages and then, perhaps, a few comments.

As I say, I am not an attorney. I was unable to procure an attorney in the State of Washington.

I checked with the Assistant Attorney General and he introduced me to the president of the Bar Association at Olympia. The president of the Bar Association said that, perhaps, there was a rather radical gentleman up here that I might go see, that he had represented, or acted, as counsel for some Communists. So, I didn't go to see that attorney until after we had our suit filed and we were working along on it and I told my wife we would go to see that man, and that we will find that he is a very good friend of Mr. McKelvy's. And so it turned out to be. I asked him whether he would represent me in a suit against an attorney and he said, I will

ask you one question, who is this attorney. And I told him who was involved and he said, "No, I wouldn't. He is a very good friend of mine. I don't mean we go to his house or that he to my house."

His name is—it slips my mind now. I will give it to the Court. I will give the Court his name.

So, I think, if I relate to the Court my feelings about this thing it will do more good all the way around than to read the Complaint again since you have read it.

I want you to indulge me in this. It is going to be somewhat off the beaten path, or off the path you had expected. [77]

My position isn't that easy. I am not going to be intimidated or I will never be able to again feel that I had the right to criticize anyone else. I have criticized like everybody else had and perhaps called this fellow "yellow," or that fellow "yellow."

My honor would be shot. I couldn't unless I would carry this thing on.

I had thoughts of not filing suit and I was then unable to sleep. I told my wife that it was a moral obligation that I go ahead with the suit and clear up such an awful situation and with Christ as my mentor, things would just have to work out so that we would be awarded a Judge that would have the high regard for his position and recognize the fact that it was a position that required of him to be Christlike in his honor.

That this Judge would recognize that we all are here only for one purpose and that he appreciate the fact that man has never made anything. That

all life and all material things are made by Him and perhaps also recognize the fact that there are no true elements as spoken of by the scientists but, on the contrary, that all things are made and can be analyzed to be atoms and thence to the fact that they in turn can again be shown to be of nothing—so the fact that God had made all things from nothing.

All man has ever done is to fashion things and combine things from the things or material that God has provided for man to work with. That the closest thing that man has is his name. That men may derogate ones name but never his honor. That the only one that [78] can ruin his honor is himself. That if man loses money, he loses something if he would have used it to do good; if his name is damaged, he has lost much; but if he loses his honor, he has lost everything.

I carry no animus for anyone. I do not believe that harm will come to me from the intimidation. I believe that some people in some sections of the globe have experienced a hard life, have, through environment and heredity gotten the wrong philosophy of life. I think they should look up to the sky and ponder a few minutes on the possibility of there being perhaps millions of earths such as ours with people on them or that may one day become inhabited by an overflow of people from our own planet and think of the fact that man cannot make anything but only combine or analyze that which God had already provided or to seriously ask himself who am I, and write down his thoughts.

I do not believe in capital punishment but believe that men in high places should be removed from their positions if they do not possess the moral fiber required in such positions. I believe that all men and associations should be held to account for their wrongs or for the stifling of others' rights and, especially if such organization has a monopoly, such as the Bar Association.

I believe that attorneys should be and act as agents of the Courts and that the aim be that justice shall be done and not that the aim of the attorneys be solely the winning of their case by any trick technicality shift of judges so one judge might rely on the findings of the judge before him and make certain findings and the final [79] judge to hear the same case try to relieve his conscience in making a wrongful decision that he only had a small share in the wrong committed.

I believe in such a situation that each of said judges are morally guilty of the whole wrong committed by such decision.

Because of, and basic in the above, I handed to Judge Bowen the small piece of paper on July 2, 1951, and it is also basic and with the transcript of record of April 16, 1951, and the file herein the basis for plaintiff's contemplated suit for the removal from judgeship of Judge Sam M. Driver.

I know that evidence of losses is not to be admitted into evidence at this time, but I have brought some of the exhibits of inventions on which I claim losses and those only on which application for patent have been filed or patent papers granted to

show that the size of my claim has a foundation.

I think I will conclude with that, your Honor.

If you feel, as I said before if your Honor should deny, and if your Honor feels that he should grant these motions to dismiss, I ask that it be done with prejudice so that I can go ahead with the filing of an appeal.

The Court: Do you have any comment?

Mr. Croson: Just two things. I might renew our request with respect to the motion. If your Honor should grant the motion. Also we have a motion for additional security of costs. There is only \$250 provided at the present time.

The Court: Well, the Court sees no purpose in [80] delaying a decision.

The Court has gone over the files at some length and, frankly, is going to grant the motions to dismiss.

The matter has been before Judge Lemmon and Judge Driver and this Court has attempted to analyze this Complaint, realizing that the Plaintiff has acted as his own attorney, but has been unable to see that the Plaintiff has met the defects of the complaint as set forth by Judge Driver and Judge Lemmon.

This Court feels that those motions to dismiss were well-taken and that this Second Amended Complaint, while stated in different language, has not remedied that defect.

The Court is of the opinion that the Plaintiff has not set forth a cause of action and, likewise, that the statute of limitations has run.

The Court sees no further purpose of going into the matter and suggests that, at the request of Plaintiff and the Defendants, it be with prejudice so that it may be appealed.

I might set a date if there is to be any discussion as to form of motion.

Mrs. Curry: Order, you mean.

The Court: I mean order. The Court will set a date. It will have to be this week or the last week in August.

Mrs. Curry: As far as I can conceive, the order is a very simple one. I think your Honor stated it there. I think that is all there is. [81]

The Court: Does the Plaintiff wish to argue the form of the motion to dismiss. If you do, we will fix a time. It should be this week.

Mrs. Curry: Form of order.

The Court: Form of order. I am sorry. The Court will put the matter down for 9:30 tomorrow morning.

Mrs. Curry: That will not be enough time.

The Court: We will make it one-thirty tomorrow afternoon.

(Whereupon, at 5:30 o'clock p.m., August 6, 1951, hearing was concluded.) [82]

Certificate

I, Earl V. Halvorson, official court reporter for the within-entitled court, hereby certify that the foregoing is a true and correct transcript of matters therein set forth.

/s/ EARL V. HALVORSON.

August 7, 1951

The Court: Number 2673, Schaefer vs. Macri, et al.

Mr. Croson: May it please the Court, I am presenting to your Honor an order of dismissal which I have prepared which has been approved by counsel for the other two defendants. A copy is acknowledged as being received by Mr. Schaefer.

I would like for your Honor to read through the order, if your Honor will, because I have tried to incorporate in it an order of dismissal and also a final dismissal of the supplemental complaint on the theory that, when the motions are sustained and dismissed, that automatically dismisses the other.

The Court: The Court will read it through.

Mr. Croson: Yes, if you would.

The Court: Now the Court raises this question: I think it is a matter, possibly, on which the Court might be guided by the desire of the parties inasmuch as it will be incumbent upon the Plaintiff, or the Defendant, to further their own interests on appeal.

Having in mind that this matter may be presented to the Court, Appellate Court, is it in such a form as the Court may most intelligently rule. Do you feel that there is any purpose to be served by being at all specific in setting forth the ruling, the Court having in mind this: In this Complaint, the several Complaints, that have alleged wrongs or claims for relief it appears to be, when you examine the pleadings as a whole, an action in conspiracy. The statute, in the Court's opinion, runs against

such an action as alleged. Assuming that [3*] the claims for relief are properly alleged, is the record in a better position for appeal with this general order, or is there any advantage to any party in having specific grounds set forth. I ask counsel, the Court believing that the form of the proposed order should be satisfactory to the Plaintiff.

Mr. Croson: I think that is a good question. My thought on the matter is this: Your Honor will recall that Plaintiff did desire to have the order recite that it was with prejudice.

The Court: That is right.

Mr. Croson: So that, if your Honor please, in your Honor's statement yesterday you did cover the grounds that are covered in our motions, therefore I felt that an order granting our motions to dismiss, upon all grounds in the motions—if I am in error——

The Court: I don't believe you are in error, Mr. Croson. The sole point is to assist in bringing this to issue in the best manner.

Mr. Croson: And it is for that reason that I tried to close that little gap.

The Court: The Court feels that that would be proper and would have no disposition to change that phase of it.

Mrs. Curry?

Mrs. Curry: A court rule that the Supreme Court passed upon is that any order of the court, upon appeal, can be upheld on any grounds. There-

* Page numbering appearing at top of page of original Reporter's Transcript.

fore, it would be of little value for a person to [4] state the grounds because it can be supported on any grounds in the Appellate Court.

The Court: Mr. Egan?

Mr. Egan: Our reactions are the same as Mrs. Curry. I thought it was proper, your Honor. I joined with it.

The Court: Mr. Schaefer, of course you are not in accord with the final result but, having in mind this order that you would appeal on, which you may if you wish to do, do you have any comments?

Mr. Schaefer: I doubt it. All I am concerned about is that there is no bar or anything that would prevent me from taking an appeal because I do contemplate taking an appeal.

The Court: That is what the Court understands and, of course, it is an appealable order. The Court is disposed, then, to sign this order.

I think the Court should also state for the record that, relative to the parties A. J. Goerig and Clyde Philp, they not having been served, the action is abated as to them. Is that clear, Mr. Schaefer?

Mr. Schaefer: I understand if the judgment against one party in a conspiracy was had, that the judgment would be as to all the parties.

The Court: Not unless they are served.

Mr. Schaefer: Not unless they are served?

The Court: No. Under the rules, I don't think there [5] is any question about it. Under the rules, having once filed a complaint and process having

been issued, unless it is served within three (3) months, the action abates as to those parties. It is a matter of record and the Court makes that statement at this time to show disposition as to parties not named.

The Clerk: There are two motions to set cost bond on appeal.

Mrs. Curry: There is no provision in the rule as to when that should be entered and I read the rule carefully, Rule 73 C, and it was that it could be determined at any time. As a matter of convenience we thought it better to make the motion while the Plaintiff is in court. As modified, it was changed in 1948. After bond is filed the Court can make an order as to sufficiency in form but it leaves the question as to amount open at this time.

I have a proposed order. The trouble is this will require quite an expensive brief and the last brief that I had printed cost \$248 and I don't believe a \$250 bond would cover it because our briefs will be in the neighborhood, the three briefs would be in the neighborhood, of \$700 anyway, and I think it only fair that we be protected to where the cost of the brief is covered anyway.

I think all parties here have made the same motion.

Mr. Croson: My thought in connection with it is, it was stated in open Court and the record so shows that an appeal is contemplated.

The Court: I wonder until such time as an action is [6] taken whether it would be proper for the Court to determine it.

Mrs. Curry: I can see no reason why not. The statute says the Court may enter it. The rule says the bond must be filed with notice of appeal and not less than \$250 unless the Court orders otherwise. How can the Court order otherwise unless it is before the bond is filed. So, it must be before appeal is filed, which means notice of appeal because the bond must accompany the notice of appeal.

The Court: Are you asking in here—I might ask the parties—that three separate bonds be filed? There are three motions and they are all in the same language.

Mrs. Curry: Well, I thought so that we were each protected in a specific amount. I don't care whether it is one bond or a dozen. I wanted our client protected in a certain amount so that one defendant doesn't get all the costs.

The Court: The order says that Plaintiff should furnish bond in the sum of blank dollars for each of the Defendants.

Mr. Croson: One bond I don't object to, but it would be so much for my client.

The Court: Is that true of you too, Mr. Egan?

Mr. Egan: Yes, sir.

The Court: I think, as the Court recalls, the rule, the minimum required is \$250.

Mrs. Curry: That is right.

The Court: Regardless of the number of defendants, [7] and you are asking for the gross amount of how much?

Mrs. Curry: We are asking fifteen hundred dollars.

Mr. Croson: On the theory these defendants are not joined.

The Court: The Court understands. The Court will fix the bond in the amount of \$750, \$250 each. This doesn't say in so many words, but it is surety bond. I believe there is something in the file indicating that the Plaintiff was not able to secure bond.

Mr. Schaefer: That is right, so that I make it a request that it be permitted that I make cash bond.

The Court: You have on file now with the Clerk how much?

Mr. Schaefer: \$250.

The Court: Is that cash?

Mr. Schaefer: Yes.

The Court: We would have to increase that to \$750.

Mrs. Curry: We would need costs after that.

The Court: I think that bond has to stay there. I think the money will remain, the original non-resident cost bond of \$250. I believe this would have to be an additional bond. You understand in the event you prevail you recover the money.

Mr. Schaefer: That is right.

The Court: And in the event you do not, the Court is of the opinion that the costs payable will exceed the amount.

Mrs. Curry: I believe our only costs in this so far is [8] the statutory attorneys' fees. There are no filing fees in Federal Court.

The Court: There have been no costs other than filing up to this point.

Mrs. Curry: I don't think we are entitled to our transcript.

The Court: The order on bond on appeal will be signed and entered.

(Whereupon, at 2:00 o'clock, p.m., August 7, 1951, hearing was concluded.) [9]

Certificate

I, Earl V. Halvorson, official court reporter for the within-entitled court, hereby certify that the foregoing is a true and correct transcript of matters therein set forth.

/s/ EARL V. HALVORSON.

[Endorsed]: Filed Sept. 27, 1951. [10]

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 13129

M. C. SCHAEFER, an Individual,

Plaintiff and Appellant,

vs.

SAM MACRI, DON MACRI and JOE MACRI,
Individuals; W. R. McKELVY; CONTINEN-
TAL CASUALTY COMPANY, a Corporation;
and A. J. GOERIG and CLYDE PHILP,
Individuals,

Defendants and Appellees.

STATEMENT OF POINTS ON APPEAL

Comes now the plaintiff and appellant herein, M. C. Schaefer, and pursuant to Rule 19 of the above-entitled Court, states that he will rely upon the following points in the prosecution of his appeal from the order of dismissal herein:

1. The United States District Court erred in entering an order granting the motions to dismiss in favor of the defendants and against this plaintiff, for the reasons that the complaints herein do state a cause of action, and there is nothing in the file or in any of the records that will sustain this order granting the motions to dismiss.

2. The United States District Court erred in entering an order granting the motions to dismiss

in favor of the defendants and against this plaintiff, for the reasons that the complaints herein do state tortious acts and overt acts within the statute of limitations and within a few months of the filing of the original complaint herein.

3. The United States District Court erred in denying plaintiff's motion to file supplemental complaint alleging additional facts with respect to the defendant W. R. McKelvy and naming as an additional party one B. J. Rask and alleging new matter as to him in that said additional allegation of new matter are extremely vital to plaintiff's case.

/s/ M. C. SCHAEFER,

M. C. Schaefer, Plaintiff and
Appellant.

[Endorsesd]: Filed Sept. 27, 1951, U.S.D.C.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision I of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75 (o) of the Federal Rules of

Civil Procedure, I am transmitting herewith all of the original papers in the file dealing with the above-entitled action, and that the same constitute the complete record on file in said cause. The papers herewith transmitted constitute the record on appeal from the final order of dismissal entered in the cause to the United States Court of Appeals for the Ninth Circuit, and are identified as follows:

1. Complaint, filed Dec. 1, 1950.
2. Notice of Appearance of defendant, Don Macri, filed Dec. 13, 1950.
3. Marshal's Return on Summons, filed Dec. 18, 1950. (Defendants Sam Macri, A. J. Goerig, and Clyde Philp not found.)
4. Appearance of defendant Continental Casualty Company, filed Dec. 21, 1950.
5. Affidavit of Mailing re above appearance, filed Dec. 21, 1950.
6. Motion of defendant W. R. McKelvy to Dismiss, filed Dec. 21, 1950.
7. Notice of Hearing Motion to Dismiss, filed Dec. 21, 1950.
8. Memorandum of Defendant McKelvy in Support of Motion to Dismiss, filed Dec. 21, 1950.
9. Motion of defendant Continental Casualty Company to Dismiss for failure to State a Claim, filed Dec. 27, 1950.
10. Affidavit of Mailing above motion, filed Jan. 9, 1951.
11. Supplemental Memorandum of Authorities on Part of Defendant McKelvy, filed Jan. 9, 1951.

12. Order of Dismissal as to Defendant Continental Casualty Company, lodged Jan. 13, 1951, (later filed on Feb. 7, 1951.)

13. Affidavit of Mailing Order of Dismissal, filed Jan. 13, 1951.

14. Motion of defendants Macri to Dismiss, filed Jan. 15, 1951.

15. Notice of Hearing on above motion to Dismiss, filed Jan. 15, 1951.

16. Bond for Costs—Non-resident, filed by plaintiff Jan. 17, 1951.

17. Letters, Plaintiff to counsel, acknowledging service re order of dismissal, and striking of motion defendants Macri to dismiss from calendar as amended complaint to be filed, filed Jan. 22, 1951.

18. Court Reporter's Transcript of Hearing on Defendant McKelvy's Motion to Dismiss, filed Jan. 29, 1951.

19. Affidavit of Service of Altha P. Curry of proposed order of dismissal, filed Feb. 7, 1951.

20. Letter, Schaefer to A. P. Curry, dated Jan. 19, 1951, acknowledging receipt of proposed order of dismissal, filed Feb. 7, 1951.

21. Order of Dismissal and Requiring Cost Bond, filed Feb. 7, 1951. (As to defendant McKelvy.)

22. Order of Dismissal as to Defendant Continental Casualty Company, filed Feb. 7, 1951.

23. Amended Complaint, filed Feb. 9, 1951.

24. Demand of Plaintiff for Jury Trial, filed Feb. 9, 1951.

25. Marshal's Return of service of Amended

Complaint and Demand for Jury Trial, filed Feb. 14, 1951.

26. Motion of defendant McKelvy to Dismiss amended complaint, filed Feb. 16, 1951.

27. Supplemental Memorandum of Defendant McKelvy in Support of Motion to Dismiss, filed Feb. 16, 1951.

28. Alternate Motion to Strike of defendant McKelvy, filed Feb. 16, 1951.

29. Motion of deft. McKelvy for Additional Security for Costs, filed Feb. 16, 1951.

30. Affidavit of W. Paul Uhlmann in Support of Motion of deft. McKelvy for additional security for costs, filed Feb. 16, 1951.

31. Affidavit of Service of Motion to Dismiss and other papers, filed Feb. 16, 1951.

32. Printed Transcript of Record, Continental Casualty Company vs. M. C. Schaefer, etc., U. S. Supreme Court, Vol. 1, filed Feb. 16, 1951.

33. Same, volume V., filed Feb. 16, 1951.

34. Printed Transcripts of Record, A. J. Goerig and Clyde Philp vs. Continental Casualty Company, et al., filed Feb. 16, 1951.

35. Letter W. Paul Uhlmann to Clerk Millard P. Thomas, dated 2/16/51, filed Feb. 16, 1951.

35a. Motion defendant Continental Casualty Company to Dismiss or to Strike, filed Feb. 19, 1951.

36. Affidavit of Mailing Motion to Dismiss, filed Feb. 19, 1951.

37. Motion defendants Macri to Dismiss or to Strike, filed Feb. 21, 1951.

38. Letter, Schaefer to Clerk Millard P. Thomas, filed Mar. 3, 1951.

39. Court Reporter's Transcript of Hearing on motion of defendant W. R. McKelvy to Dismiss, and Motion of Defendant Continental Casualty Company to Dismiss for Failure to State a Claim, filed Mar. 23, 1951.

40. Letter A. P. Curry to Clerk Millard P. Thomas, dated 3/24/51, filed March 27, 1951.

41. Motion defendant W. R. McKelvy to Set Hearing on Defendant McKelvy's Motion to Dismiss and Alternate Motion to Strike, filed Apr. 2, 1951.

42. Notice of Hearing on above motion, filed Apr. 2, 1951.

43. Motion of Continental Casualty Company for Setting of Motion to Dismiss, filed Apr. 3, 1951.

44. Affidavit of Mailing of above motion, filed Apr. 3, 1951.

45. Motion of Defendants Macri for Setting of Motion to Dismiss, filed April 3, 1951.

46. Memorandum of M. C. Schaefer Resisting Motion of Continental Casualty Co., to Dismiss or to Strike, filed Apr. 16, 1951.

47. Memorandum of M. C. Schaefer Resisting Motion of Defendant W. R. McKelvy to Dismiss Plaintiff's Amended Complaint, filed Apr. 16, 1951.

48. Plaintiff's Statement Resisting Alternate Motion of Defendant McKelvy to Strike, filed Apr. 16, 1951.

49. Court Reporter's Record of Proceedings at trial Feb. 21, 1947, in Eastern District of Washington, Southern Division, filed April 16, 1951.

50. Court Reporter's Transcript of Hearing on Defendant's, W. R. McKelvy, Motion to Dismiss and Defendant's, Continental Casualty Company, Motion to Dismiss for Failure to State a Claim, filed Apr. 16, 1951. (This is duplicate copy of item No. 39.)

51. Letter, Judge Driver to Counsel, dated May 2, 1951, granting motions to dismiss, with leave to file second amended complaint within 30 days, filed May 2, 1951.

52. Court Reporter's Transcript of proceedings on setting of Motion to Dismiss for hearing, filed Apr. 23, 1951.

53. Court Reporter's Transcript of Proceedings at Hearing on Motions to Dismiss and Alternative Motions to Strike, filed Apr. 25, 1951.

54. Order of Dismissal, but granting plaintiff 30 days to file second amended complaint, filed May 17, 1951, with letter from Judge Driver, dated May 16, 1951, to Plaintiff and counsel attached.

55. Second Amended Complaint, filed June 15, 1951.

56. Demand of Plaintiff for Jury Trial, filed June 15, 1951.

57. Motion of defendant McKelvy for Additional Security for Costs, filed June 21, 1951.

58. Motion of defendant McKelvy to Dismiss, filed June 21, 1951.

59. Notice of Hearing above motions, filed June 21, 1951.

60. Motion defendant McKelvy to Set Hearing

on his Motion to dismiss and Motion for Additional Security of Costs, filed June 21, 1951.

61. Motion defendant Continental Casualty Company for Additional Security for Costs, filed June 25, 1951.

62. Motion defendant Continental Casualty Company to Dismiss, filed June 25, 1951.

63. Affidavit of Mailing, filed June 25, 1951.

64. Motion of Continental Casualty Company for Setting of Motion to Dismiss, and Motion for Additional Security for Costs, filed June 25, 1951.

65. Statement of Plaintiff Schaefer requesting assignment of cause to a judge with qualifications as stated therein, filed July 2, 1951.

66. Motion of defendants Macri to dismiss, filed July 5, 1951.

67. Motion defendants Macri for Additional Security for Costs, filed July 5, 1951.

68. Motion of Defendants Macri for setting motion to dismiss and Motion for additional Security for Costs, filed July 5, 1951.

69. Court Reporter's Transcript of Proceedings before Judge Lindberg, July 2, 1951, filed July 12, 1951.

70. Motion Plaintiff for Order Permitting Filing of Supplemental Complaint, filed Aug. 6, 1951.

71. Analysis of Second Amended Complaint, filed Aug. 6, 1951, by Continental Casualty Company.

72. Memorandum of M. C. Schaefer Resisting Motion of Defendants to Dismiss Plaintiff's Second Amended Complaint, filed Aug. 6, 1951.

73. Memorandum Authorities in Support of Defendant McKelvy's Motion to Dismiss Third Amended Complaint, filed Aug. 6, 1951.

74. Order of Dismissal, filed August 7, 1951.

75. Motion defendants Macri to set appeal bond in sum of \$500.00, filed August 7, 1951.

76. Motion defendant McKelvy to set appeal bond in sum of \$500.00, filed August 7, 1951.

77. Motion defendant Continental Casualty Company to set Amount of Bond on Appeal in amount of \$500.00, filed Aug. 7, 1951.

78. Order Setting Amount of Bond on Appeal in sum of \$750.00, filed 8/7/51.

79. Cost bill, defendant Continental Casualty Company, filed Aug. 7, 1951.

80. Cost Bill, defendants Macri, filed Aug. 7, 1951.

81. Cost Bill, defendant McKelvy, filed Aug. 7, 1951.

82. Notice of Appeal of Plaintiff Schaefer, filed Sept. 4, 1951, with copy of letter, Clerk to counsel transmitting copies, attached.

83. Appeal Bond, \$750.00, cash, filed Sept. 4, 1951.

84. Appellant's Designation of Contents of Record on Appeal, filed 9-4-51.

85. Statement of Points on Appeal by Plaintiff-Appellant, filed Sept. 4, 1951.

86. Copy of Telegram, Schaefer to Judge Driver dated May 8, 1951, filed Sept. 27, 1951.

87. Letter (copy) Schaefer to Judge Driver dated May 8, 1951, filed 9-27-51.

88. Court Reporter's Transcript of Proceedings before Judge Lindberg on August 6, 1951, re Motion of Defendants to Dismiss Second Amended Complaint, filed Sept. 27, 1951.

89. Letter, Halvorson to Schaefer, dated Aug. 21, 1951, filed Sept. 27, 1951.

90. Certificate of Court Reporter Halvorson to Transcript of Aug. 6, 1951, filed Sept. 27, 1951.

91. Certificate of Court Reporter Halvorson to Transcript of August 7, 1951, filed Sept. 27, 1951.

92. Affidavit of Robert J. Hage, et al., and Walter W. Voss, et al. re Court Reporter's Transcript of proceedings on Aug. 6, 1951, filed 9-27-51.

93. Affidavit of M. C. Schaefer re conversations and dealings with Court Reporter Earl V. Halvorson, filed Sept. 27, 1951.

94. Statement of Points on Appeal by Appellant, filed Sept. 27, 1951.

95. Appellant's Designation of Contents of Record on Appeal, filed 9-27-51.

96. Letter, Schaefer to Judge Lindberg, dated Aug. 31, 1951, filed 9-27-51.

97. Letter, Judge Lindberg to Schaefer, dated 9-4-51, filed Sept. 27, 1951.

98. Letter, M. C. Schaefer to Judge Lindberg, dated 9-10-51, filed 9-27-51.

99. Letter, Halvorson to Schaefer, dated 9-13-51, filed Sept. 27, 1951.

100. Letter, Schaefer to Judge Lindberg, dated 9-21-51, filed Sept. 27, 1951.

I further certify that the following is a true and correct statement of all expenses, costs, fees and

charges incurred in my office for preparation of the record on appeal herein on behalf of plaintiff, to wit: Filing fee, Notice of Appeal, \$5.00, and that said amount has been paid to me by the Appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 28th day of September, 1951.

MILLARD P. THOMAS,
Clerk,

[Seal] By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 13129. United States Court of Appeals for the Ninth Circuit. M. C. Schaefer, Appellant, vs. Sam Macri, Don Macri, Joe Macri, W. R. McKelvy and Continental Casualty Company, a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed October 8, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.